

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from Michigan Court of Appeals

Hon. M.J. Kelly, P.J. Wilder and K. Fort Hood, JJ

EARL H. ALLARD, Jr.

Supreme Court No. 150891

Plaintiff/Appellant

Court of Appeals No. 308194

-v-

CHRISTINE A. ALLARD

Defendant/Appellee

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Liisa R. Speaker (P65728)
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AMICUS CURIAE BRIEF FOR THE MAJORITY OF THE FAMILY LAW SECTION OF
THE STATE BAR OF MICHIGAN

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 regarding the following identified matters. The position taken 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

This Court granted leave to appeal in *Allard v Allard* on June 10, 2015 and requested amicus briefs from various sections of the State Bar of Michigan, including the Family Law Section.

STATEMENT of QUESTIONS PRESENTED

I. May parties waive the application of MCL 552.23 and MCL 552.401 through an antenuptial agreement?

Answer:

(A) MCL 552.23 gives a trial court the authority to award separate property of the other party and spousal support to a party when the marital estate is otherwise insufficient to suitably support a party *and any children of the marriage*. MCL 552.401 recognizes and awards one party's contribution to the other party's separate property.

(B) The prenuptial statute, MCL 557.28 allows parties to make contracts related to marital property, but not necessarily support, "A contract relating to property made between persons in contemplation of marriage shall remain in full force after marriage takes place. . . .". MCL 552.23 includes "support and maintenance of either party and any children of the marriage."

(C) The *Rinvelf* case held that prenuptial agreements are not facially against public policy as to the division of property in the event of divorce, but that they must be entered into voluntarily, with full disclosure and with rights of each party and the extent of the waiver of such rights understood. Per the *Staple* case, a knowing waiver must be very explicit with assurance that the meaning and potential consequences should be explained to each party. Additionally, case law, *Reed v Reed*, 265 Mich App 131; 693 NW2d 895 (2005) emphasizes that a court has discretion to review changes in circumstance using a foreseeability standard.

(E) There appears to be a COA trend to uphold all contracts made between parties. However, a family law case is not a business transaction, and should also be reviewed in light of our very specific statutory rights and focus on equity. While spousal support can be waived upon a divorce, the waiver must be very explicit. However, spousal support may not necessarily be waived in a contract contemplating marriage and child support is not subject to waiver.

II. Whether the real estate held by the parties' limited liability companies, including the marital home, and any income generated by those properties could be treated as marital assets?

Answer:

A. The Court of Appeals Correctly Held that the Assets Titled in the Names of the LLCs are not Separate Property.

- (1) Defendant-Appellee Preserved the Issue of Classification of Property as Marital or Separate.
- (2) LLCs are Separate Legal Entities
- (3) Ownership of a Single-member LLC is not Analogous to Ownership of Shares in a Publicly-traded Corporation.
- (4) Plaintiff-Appellant Acquired Property, not Simply Membership Interests.
- (5) Traditional Piercing the Corporate Veil Doctrine is Not Relevant to the Classification Issue.
- (6) The Antenuptial Agreement Should Be Interpreted in the Context of Marriage, not a Business Deal.

B. The Court of Appeals Correctly Held that the Income Earned by the Parties is not Separate Property.

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 Family Law Council.

The Council provides services to its membership in the form of educational seminars, monthly Family Law Journals (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 10, 2015 Order granting leave to appeal.

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.

Mrs. Allard worked at two (2) different advertising companies during the first

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.

several years of the marriage earning approximately \$30,000 per year. She left the workforce in 1999 after becoming pregnant with the parties 2nd 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. The Court of Appeals 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. The Court of Appeals concluded that the prenuptial agreement in *Allard* was valid and enforceable. *Allard v Allard*, 308 Mich App 536, 594 NW2d 143 (2014).

The husband filed a Supreme Court application to challenge the trial court's classification of certain property as marital. The wife did not file a cross appeal to challenge the Court of Appeals' decision to prohibit invasion of separate property. Nonetheless, this Court granted leave to examine “whether MCL 552.23 and MCL 552.401 are inapplicable where the parties entered into an antenuptial agreement” and whether the real estate held by the husband's LLCs “could be treated as marital property and, if so, under what conditions.” *Allard v Allard*, 497 Mich 1040; 864 NW2d 143 (2015).

Lastly, the Court of Appeals found that the Trial Court erred in finding that all of the property that Mr. Allard acquired during the marriage was acquired as his separate estate,

because he transferred certain property into single member LLCs.

LAW AND ARGUMENT

I. The Court of Appeals erred in enforcing a prenuptial agreement which is contrary to express statutory provisions, and even if permitted by statute, by not requiring the prenuptial agreement to express a clear waiver of a statutory right.

- A. MCL 557.28 only permits parties to enter into prenuptial agreements “relating to property,” not as to spousal support or attorney fees.**
- B. Both MCL 552.401 and MCL 552.23 provide a statutory right allowing the Trial Court to invade separate property in order to do equity, regardless of how property is defined as separate.**
- C. 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 reflect 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.**
- D. There should 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, and (3) the agreement was neither procedurally nor substantively unconscionable at the time of execution; and (4) the agreement was not substantively unconscionable at the time of enforcement; and (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.**

Overview

Agreements in domestic relations cases are not arms-length commercial transaction. Family law involves unique considerations as recognized in long-standing

case law and in statute. The fundamental duty of a trial court is to ensure the fair and equitable treatment of the parties, including an equitable division of property and award of support. *Sparks v Sparks*, 440 Mich 141, 152; 485 NW2d 893 (1992). As stated by this Court in *Sparks*:

“Divorce actions in Michigan are still considered a type of equity suit even though Michigan no longer has separate equity courts.” *Id* at 150 (citing in a footnote to MCL 552.12, which provides that divorce actions shall be conducted in the same manner as other suits in courts of equity). ...

“In equity cases it is not enough for the trial court to have acted in a nonarbitrary manner; it must also reach a disposition that is fair and just.” *Id.*¹

Party agreements in domestic relations cases need to be understood within this unique context.

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

The Court of Appeals wrongly affirmed a prenuptial agreement to relieve one spouse from paying spousal support and attorney fees to the other spouse. 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’

¹ Also stated in *Sparks*:

“... the statutes dealing with the disposition of property upon divorce do not require any deference to the lower court. Indeed, the statutes each include an indication that general principles of equity must be considered [citing MCL 552.23(1)].” *Sparks, supra*, at 149.

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).

It was not until 1991 that the Court of Appeals first expressly held in a divorce case -- *Rinvelt* -- that a prenuptial contract is enforceable even when it is made in contemplation of divorce. *Id.* at 379. 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 to property. It does not allow prenuptial agreements pertaining to spousal support or alimony. By specifying property, the Legislature necessarily intended to exclude spousal support and attorney fees.

This interpretation is also consistent with the history of prenuptial agreements, which were against public policy and required the Legislature to enact a statute in order to legalize them. 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). Thus, when a statute is in derogation of common law, the courts must strictly and narrowly construe the statute. *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008). Such is the situation with the Legislature's enactment of MCL 557.28.

Because the Court of Appeals in *Allard* failed to honor the legislative intent, it incorrectly decided *Allard*.

B. Both MCL 552.401 and MCL 552.23 provide a statutory right allowing the Trial Court to invade separate property in order to do equity.

The Court of Appeals incorrectly decided *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. It is evident throughout the Legislature's codification of the divorce laws that equity was a paramount concern. This concept starts with MCL 552.12, which provides that divorce proceedings are suits in equity. MCL 552.12. To that end, 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 authority of the trial court to perform its function to ensure equity. Thus, when the marital estate is not sufficient 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.

In the instant case, the Court of Appeals 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 Court 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.² *Id.*

The Court of Appeals was wrong. The purpose of the invasion statutes, like the other codified laws pertaining to divorce, is to do equity. 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, as the Court of Appeals did in *Allard*, dishonors the legislative intent – both in enacting the invasion statutes, and in enacting MCL 557.28 which was in derogation of common law.

² There is an inherent tension between the protections of §23 and §401 which serve to protect a non-monied spouse, and MCL 557.28 which validates antenuptial agreements, at least to the extent that the contract “relating to property”.

C. 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, eg, Staple v Staple*, 241 Mich App 562, 568; 616 NW2d 219 (2000).

As discussed above, Michigan's codified divorce law provides a host of methods by which a trial court can ensure equity. 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. And a party in a divorce has the right to request invasion under the statutes. In order to harmonize the equity provisions and the prenuptial statute, any waiver of invasion of separate property, or waiver of equity assuming such a waiver is possible, the prenuptial agreement must clearly express the parties' intent to forgo specific statutory rights, analogous to the Court of Appeals' 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. 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. *Staples* sought to avoid that situation and stated that “[i]n order to prevent this very type of protracted litigation, the parties’ or the court’s intent should be clearly and unequivocally expressed upon the record and in the ultimate instrument that incorporates the alimony provision.” *Id.* Finally, *Staple* held “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.” *Id.* at 581.³

³ *Staple* accords with this 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 provision, we assume that the plain meaning was intended, and we enforce the statute 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).

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 the any agreement to make spousal support non-modifiable must be a knowing and express waiver of the 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, success, 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. 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 make an express waiver of their statutory rights in the prenuptial agreement.

D. There should 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 401.⁴

Rinvelt and its progeny have affirmed the right of consenting adults to enter into

⁴ *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 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.

binding contracts. But a marriage and a family is not a business, and *Allard* is a dramatic and classic example of application of commercial contract principles to a marriage relationship, and fairness and equity gone awry.

The legal effect of the antenuptial agreement in the *Allard v Allard* case was to create “Super Separate Property” beyond the reach intended by the Michigan Legislature in MCL 552.23 and MCL 552.401. Michigan case law clearly supports application of “presumptions” of validity of agreements, and judicial articulation of those presumptions in the instant *Allard* case will furnish guidance and reduce protracted litigation³ in this complex area of family law.

Marriages in Michigan are not “commercial contracts.” See *Sparks, supra*. 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 Re Benker* regarding the “special nature” of marriage contracts which involve “extreme mutual confidence”:

“Such agreements, while recognized as valid instruments, are of a special nature because of the fact that they originate between the parties contemplating marriage. This relationship is of extreme mutual confidence and, thus, presents a unique situation unlike the ordinary commercial contract situation where the parties deal at arm’s length.” *Rinvelt, supra*, p. 378.
citing *In Re Benker*.

Insofar as marriage contracts are not “arm’s length commercial contracts”, they should be subject to a different level of judicial scrutiny than complex commercial

³Disputes arising out of separate property and premarital agreements appear to be a disproportionate percentage of family law appellate cases. This is more than likely due to (a) significant assets at risk gives rise to significant attorney fees — which beget protracted litigation; (b) the “yes-no” or “black & white” ruling on a contract makes for very high trial court and appellate stakes.

transactions such as mortgages, leases, merger agreements, secured transactions, and the like. Marital contracts are appropriately evaluated as to whether or not these personal agreements effectuate and actually enhance the “extreme mutual confidence” described in *In Re Benker*.

The confluence of case law involving antenuptial agreements in the event of death with antenuptial agreements in the event of divorce involves dramatically different public policy considerations. It is noteworthy and significant that for half a century or more, prenuptial agreements relating to the rights of parties upon death, were permissible; *In Re Muxlow Estate*, 367 Mich 133, 134; 116 NW2d 43 (1962). Antenuptial agreements involving divorce were prohibited.

The effect of an antenuptial agreement is that a monied spouse, with substantial premarital assets, may not face any consequences for dysfunctional behavior, gambling or other addictions, domestic violence or other destructive behaviors. Accordingly the public policy which encourages marriages with antenuptial agreements dealing with death of a party is not 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, the allegations of domestic violence fell on deaf judicial ears. 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 care of 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 forever freed him from an alimony

exposure and preserved the Allard 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.

Marital Contracts May Be Presumed To Be Valid Where Both Parties Have Had Access To Independent Legal Counsel. The core concept behind an antenuptial agreement is a waiver of statutory or common law rights. The core concept underlying the “knowing waiver” is the fact that a “knowing waiver has occurred.” *In Re Benker’s Estate*, supra, makes this crystal clear — the parties must have an understanding his or her rights:

“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.

The law associated with antenuptial agreements is complicated, convoluted, and complex and a lay person without the assistance of a highly skilled attorney would be unlikely to understand her rights in such an agreement. In the present case, Mrs. Allard had not been in the work force for a decade and had assumed the position of full time homemaker, presumably with the blessing of her husband. 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 §23 claims, §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 monied 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.

Marital Contracts May Be Presumed To Be Valid If They Strictly Comply With MCL 557.28 And Do Not Contain A Waiver of Alimony or Attorney Fees or Other Non-Property Waivers.

Mrs. Allard signed an antenuptial agreement providing for a waiver of both spousal support and attorney fees in her antenuptial agreement which is contrary to MCL 557.28. However, Michigan law specifically provides for a statutory claim of spousal support; *Parrish v Parrish*, 138 Mich App 546, 553; 361 NW2d 366 (1984); and Michigan law specifically provides for an award of attorney fees by statute. MCL 552.13 and by Court Rule, MCR 3.206(C). As discussed, *supra*, as a rule of statutory construction, an unambiguous statute must be enforced and simple words should be given their plain meaning.

The trial court denied spousal support because of the antenuptial agreement. MCL 552.28 prohibits this punitive provision. There are good and sufficient reasons why spousal support should not be the subject of a contractual waiver: none of the future

circumstances associated with a spousal support award may be known at the time of executing the agreement. Absent a full understanding of what those future circumstances may be, it is impossible to meet the “full disclosure” requirements of an antenuptial agreement. When an antenuptial agreement is entered into, there is no *known* spousal support award, therefore, the presumption should be that it cannot be knowingly and explicitly waived.

Elimination of a “presumption of validity” Will Not Result In Wholesale Invalidation of Antenuptial Agreements. The starting point for this critical analysis of *Allard v Allard* is that there is a presumption of validity to the antenuptial agreement. Failure of a monied party to comply with all the factors set forth herein does not result in a *per se* invalidation of the entire antenuptial agreement.

Nearly all antenuptial agreements contain (or should contain) a “Severability Clause” which provides that invalidation of a portion of the agreement leaves the remainder intact. Absent a severability clause, a trial court has the discretion to consider all of the facts associated with the marriage, the parties, and the circumstances of execution, and ultimate impact of the contract, including whether or not very explicit waivers were knowingly reviewed and considered.

II. The Court of Appeals Correctly Interpreted the Antenuptial Agreement and Classified the LLCs and Income as Marital Property.

The real estate held by the plaintiff’s limited liability companies, including the marital home, and any income generated by those properties, can be treated as marital property and should be classified as marital property. Initially, and as a prefatory matter, it is undisputed that in the absence of an antenuptial agreement, the real estate and

income therefrom would be marital property. The Court of Appeals opinion states unequivocally that six LLCs were formed during the marriage and that they were used to purchase and convey numerous real estate holdings, including the marital home that was conveyed into one of the LLCs. (Slip opinion at page 4.) Thus, the LLCs were not premarital assets or gifts or inheritances during the marriage and, unless caused to be separate property by the antenuptial agreement, are to be included in the marital estate. “[A]ssets acquired and income earned during the course of the marriage are generally considered to be part of the marital estate. MCL 552.19; *Cunningham v Cunningham*, 289 Mich App 195, 201; 795 NW2d 826 (2010).” Slip opinion at page 14. This portion of the decision restates well-settled law and is not challenged on appeal. The presumption in favor of classification of property as marital should be recognized and affirmed by this Court.

A. The Court of Appeals Correctly Held that the Assets Titled in the Names of the LLCs are not Separate Property.

The Court of Appeals correctly recognized that Plaintiff-Appellant’s use of LLCs to hold property acquired during the marriage did not transform marital property into his separate property under the language of the antenuptial agreement in this case. The operative paragraph, that determines whether the real property titled in the name of an LLC is properly classified as separate property, is paragraph 5.b., which states:

5. . . . However, notwithstanding the above, the following property acquired after the marriage will remain the sole and separate property of the party acquiring the property and/or named on the property:

* * *

b. Any property *acquired in either party’s individual capacity or name* during the marriage, including any contributions to retirement plans

(including but not limited to IRAs, 401(k) plans, SEP IRAs, IRA rollovers, and pension plans), shall remain the sole and separate property of the party named on the account or the party who acquired the property in his or her individual capacity or name.

It is, of course, important to look to the language of the agreement to determine what property acquired during the marriage nonetheless remains separate. That language, in this case, relies simply on the name in which the property is acquired. Had Plaintiff-Appellant chose to acquire and hold real property in his own name, foregoing the benefits of using a corporate entity for that purpose, there is no doubt that the property would have been his separate property under the terms of the antenuptial agreement. He chose, instead, to form several limited liability companies and, then, to acquire and/or hold assets in the names of those companies. Using the plain language of the antenuptial agreement, the Court of Appeals correctly recognized that by choosing to acquire and hold assets in the name of various entities, Plaintiff-Appellant did not acquire them in his own name and, therefore, the property is not his separate property.

Factually, Appellant's Application for Leave to Appeal and Appellant's Brief both identically describe how he acquired the properties ultimately held in the LLCs as follows:

Mr. Allard further testified about various real estate transactions. Some of the properties were rental properties acquired in his name and eventually transferred to LLCs. (See Tr 8/18/2011 pp 38, 41-43, 45-49). Two buildings were acquired by Eastpointe Transitional Living, LLC, through its own funds and in its own name (*id.* pp 35-37, 50-51). Others were acquired directly by Grosse Pointe Properties in its name (*id.* pp 49-50, 52).

This brief factual summary leaves open several possibilities, which all start with the basic reality that the source of funds, or credit, that allowed the acquisition of properties was Plaintiff-Appellant – acting at various times in his own name and at other times

through a single member LLC, using income earned during the marriage.⁵ There is no claim that the disputed assets can be traced directly to pre-marital separate property. Transfer of assets to, or retention in, an LLC which was established and financed to own Plaintiff-Appellant's assets other than in his own name, is the key operative fact in light of the language of the antenuptial agreement. Thus, the holding of the Court of Appeals is correct and should be affirmed. That holding is "[w]e conclude, therefore, that as a matter of law, the LLCs created during the course of the marriage are separate legal entities and *not* to be construed, for purposes of interpreting and applying the plain and unambiguous terms of this antenuptial agreement, as being the same as plaintiff 'in his individual capacity or name.' Thus, to the extent any real estate properties or other assets were acquired during the course of the marriage by the various LLCs created during the marriage, we find that their disposition in this divorce action is *not* governed by the antenuptial agreement." Slip opinion at page 15.

Plaintiff-Appellant's challenges to this conclusion are confusing – they are based on accurate statements of the law related to LLCs, but do not recognize the context as being domestic relations or family law (as opposed to suits against a business with which the opposing party has done business) and are irrelevant to the interpretation of this antenuptial agreement. Therefore, the relevance and importance of each argument will be discussed separately.

1. Defendant-Appellee Preserved the Issue of Classification of Property as Marital or Separate.

⁵ In light of this uncertainty, Amicus agrees that this supports the Court of Appeals decision to remand to the trial court for necessary fact-finding.

Defendant-Appellee was not required to state before the trial court the legal conclusion that the Court of Appeals reached in order to preserve the issue. Defendant-Appellee made sufficient argument that the classification of property as marital versus separate was plainly at issue and explicitly declined to concede the separate property status of the assets. She was clear in arguing before the trial court that proper classification was dependent on the name in which the asset was held, as evidenced in the portion of the proceedings quoted in Appellant's Brief at page 27.

2. LLCs are Separate Legal Entities.

Amicus does not dispute Plaintiff-Appellant's legal argument that an LLC has a separate legal existence from him. The importance of this conclusion, though, is disputed. Given that the interpretation of an unambiguous antenuptial agreement is a question of law,⁶ the Court of Appeals was fully empowered to recognize that by acquiring assets in the name of the separate LLCs, Plaintiff-Appellant was not acquiring them in his own name. Under the plain language of the antenuptial agreement, title in Plaintiff-Appellant's sole name was required to classify the assets as his separate property.

3. Ownership of a Single-member LLC is not Analogous to Ownership of Shares in a Publicly-traded Corporation.

Amicus also does not dispute Plaintiff-Appellant's general description of the powers of an LLC, but disputes his suggestion that a court is required, in the context of applying the terms of the antenuptial agreement, to treat membership interests in *single-member* LLCs as if they were no different from ownership of a small number of

⁶ *Reed v Reed*, 265 Mich App 131, 147; 693 NW2d 895 (2005)

shares of stock in a publically traded corporation. The sole member of a single member LLC does acquire actual control and dominion over the assets that he then chooses to title in the name of the LLC, rather than in his own name.⁷ The single member can, at any time, decide to dissolve the LLC, fire any management employees or board members, and ensure that his (or her) wishes are carried out. (MCL 450.4401, *et seq*, vesting management in the members, or managers selected by the members.)

Unlike a Ford Motor Company shareholder, the Plaintiff-Appellant here made a choice with each asset whether to acquire it in his own name, to create a new LLC or to take title to the new acquisition in the name of an existing LLC. Thus, his actions over the years of the marriage gave him unique and sole control over whether to acquire an asset in his "individual capacity or name" or whether to use the corporation as the named owner of the asset.

A similar set of choices is made, more commonly, by individuals who chose to place title to assets in a revocable grantor trust. Such a trust has legal existence separate from the grantor, but the assets contained therein are still subject to his or her dominion and control. There is no suggestion or authority for the proposition that assets placed into a trust are no longer marital assets because they are not owned in the name of an individual, and no need to join the trust as a party to the divorce case in order to award the assets, or consider their values, when dividing the marital estate. This contrasts to an irrevocable trust, where the grantor and/or beneficiary does not have exclusive dominion and control over the assets. In such a case, as with a corporate entity where

⁷ Amicus acknowledges that the Limited Liability Company Act provides, in section 504, that a member has no interest in specific limited liability company property. MCL 450.4504(2).

the spouse does not have control of the assets and operations of the entity, then the restrictions imposed by how the asset is owned can be relevant to its distribution and valuation.

There is little law in the domestic relations property division area that provides guidance to lower courts and attorneys (and parties determining how to structure their affairs) that addresses the distinction between ownership that leaves actual control over the use and disposition of an asset with the individual partner in the marriage (such as a single-member LLC or a revocable grantor trust) and ownership where the discretion of the marital partner is limited by the interests of other owners (such as partnerships, multi-member LLCs, corporations and irrevocable trusts).⁸ While guidance in this area would be helpful, it is not necessary to provide it in this case. That is because here there are only entities that are solely owned and controlled by Plaintiff-Appellant, who chose to place assets in the name of these LLCs rather than in his sole name. Amicus urges this Court to reject the argument that in doing so Plaintiff-Appellant's interest in the property is no different from the interest of a Ford Motor Company shareholder, as that is simply not the case and such a finding would have effects on innumerable other property division issues that have not been raised, briefed or considered in the context of the relatively simple issue in this case.⁹

⁸ There is a clear rule that if the court's disposition of an asset as part of the divorce cannot affect a non-party's interest in property, unless that non-party has been joined or it is proven that there was collusion with the party. (cite)

⁹ This Court should also take the opportunity to clarify that a single member LLC is not a necessary party for purposes of a divorce property division, such that it must be formally joined before entry of a judgment obligating a party to dispose of the entity or its property in a specified way. There is no "other" whose property interests would be affected by the judgment, so no reason to require the entity to be joined as a third party in the divorce case.

4. Plaintiff-Appellant Acquired Property, not Simply Membership Interests.

Amicus urges this Court to reject Plaintiff-Appellant's proffered approach and determine that all he ever acquired was the membership interests in the LLCs, which membership interests are in his name. This approach ignores the facts of the case, which are that some assets were acquired, then transferred into the newly formed LLCs, and the economic reality that Plaintiff-Appellant selected and determined what assets to acquire, before deciding what name to title them in, his own or the name of an LLC he formed or would form to hold that property.

Of course, there are situations where someone acquires (by inheritance or purchase) a membership interest in an LLC, which has value and is an asset acquired by that person. Here, though, the facts reveal that Plaintiff-Appellant acquired various pieces of property and, after selecting what he wanted to buy, made a decision whether to take title in his own name or in the name of one of the LLCs he formed. To place undue emphasis on the fact that Plaintiff-Appellant owns the membership interests in the LLCs is to exalt form or substance, which is also what the argument in the preceding section (differentiating between interests that are controlled by the party and those which are inextricably intertwined with the interests of non-parties) points out is manifestly important to recognize in the context of equitably dividing a marital estate.

5. Traditional Piercing the Corporate Veil Doctrine is Not Relevant to the Classification Issue.

The Court of Appeals invoked the concept of piercing the corporate veil in its opinion, at page 16-17. Amicus believes this reference was made in connection with the issue of income Plaintiff-Appellant received during the marriage, rather than with the

issue of classification of property titled in the name of the LLCs being marital, as opposed to separate. Plaintiff-Appellant, though, discussed the doctrine in the context of classification, so Amicus will as well.

The doctrine called piercing the corporate veil was developed in the context of disputes between a corporate entity (that has become unable to meet its liabilities and obligations) and those who chose to do business with the entity, knowing they were dealing with an entity not an individual. The doctrine is not precisely applicable here. Defendant-Appellee does not seek to recover a corporate liability or obligation from Plaintiff-Appellant. However, the premise underlying the piercing doctrine is instructive. Where a corporate entity is not respected, and becomes a mere instrumentality of the individual, the economic substance of the situation is more important than its form. The piercing doctrine is typically invoked where the individual uses the entity to commit a wrong, for his or her own benefit, to the detriment of one who is knowingly dealing with the entity. In this situation, the Court of Appeals has created a three-prong test for piercing, while acknowledging that “there is no single rule delineating when the corporate entity may be disregarded.” *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996) citing *Papo v Aglo Restaurants of San Jose*, 149 Mich App 285; 386 NW2d 177 (1986). The three prong test requires findings that the corporate entity (1) is a mere instrumentality of the individual, (2) was used to commit a fraud or wrong and (3) caused an unjust loss or injury. This test makes logical sense in the typical commercial case where the doctrine is utilized. However, this is not such a case and, as Plaintiff-Appellant acknowledges, this Court has never adopted this three-prong test, or

any other test for piercing the corporate veil. See, e.g. *L&R Homes v Jack Christianson Rochester*, 475 Mich 853; 713 NW2d 263 (2006).

The differences between the domestic relations property division situation here, and the typical corporate creditor trying to get paid from the shareholder/member, are many. Typically, the law prevents someone from using the corporate form to enrich themselves at the expense of the company's creditors, promoting the public policy of fair and honest business dealings. Here, the public policy that is relevant to how the corporate form should be recognized is the law related to promoting marriage and the equitable division of marital property. As described above, this public policy presumes that assets acquired during the marriage are marital property and should be equitably divided in the event of divorce, unless there is a valid agreement that mandates a different classification.

The Court of Appeals panel references piercing the corporate veil as a note for purposes of remand after its discussion of the issue of income as a marital asset, not within the discussion of the property owned in the name of the LLCs. While Plaintiff-Appellant argues that the three prong test must be met to include that property in the marital estate, Amicus disagrees that such is or should be the law in this context. Rather than trying to fit this case into the commercial context, and utilize such authority as *Florence Cement v Vettraino*, 292 Mich App 461, 468-469; 807 NW2d 917 (2011), cited by the Court of Appeals, it is better analysis to honor the very different domestic relations context and go back to the general rule stated in the Supreme Court decision in *Fors v Farrell*, 271 Mich 358 (1935) which stated: “[c]orporate entity will always be recognized by the courts and the law administered accordingly unless it appears that the corporation

is functioning in such a manner as to violate or at least evade the law or contravene public policy.” Determining the effect to give the use of the LLC entities by Plaintiff-Appellant should, therefore, be based on the law and policy behind separate property and the freedom of parties to contract in connection with their marital estate.

6. The Antenuptial Agreement Should Be Interpreted in the Context of a Marriage, not a Business Deal.

The Antenuptial Agreement in this case is a contract, and should be interpreted as a contract. The language used in the contract has inherent meaning in light of the context in which it is used. Thus, resolution of the interpretation of the agreement is very similar to the analysis and approach as the question of Defendant-Appellee’s waiver of the statutory protections contained in MCL 552.23 and 552.401, discussed above. Where, as here, there is an antenuptial agreement that includes assets in the marital estate where the Plaintiff-Appellant owns and solely controls them in any other name than in his individual name, it would be wrong to utilize the technical artifice of ownership of the membership interests he created as the vehicle to own those assets to defeat Defendant-Appellee’s marital share of the assets. Plaintiff-Appellant chose to take advantage of the protections afforded by owning assets using the corporate shield, and it is only fair that he also be recognized to own them for purposes of the antenuptial agreement.

To interpret the antenuptial agreement as Plaintiff-Appellant suggests, then it would be virtually impossible for anyone to own any assets other than in his “individual capacity or name.” The provision would be a nullity as Plaintiff-Appellant can only own assets in his individual capacity or in a corporate capacity, or as trustee or beneficiary (as

to which the similar argument might be that he owned the beneficial interest in the trust in his individual capacity or name).

This interpretation would violate the general rules of contract interpretation. When interpreting a contract, the examining court must ascertain the intent of the parties by evaluating the language of the contract in accordance with its plain and ordinary meaning. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). The language of a contract is clear and unambiguous, even if inartfully worded or clumsily arranged, when it fairly admits of but one interpretation. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012). Every word, phrase, and clause in a contract must be given effect, and contract interpretation that would render any part of the contract surplusage or nugatory must be avoided. *Id.* Unambiguous contract language must be construed as a whole according to the plain and ordinary meaning. *Radu v Herndon & Herndon Investigations, Inc*, 302 Mich App 363, 374; 838 NW2d 720 (2013).

When ordinary people, contemplating marriage to each other, are considering their future property rights and describe the assets that they own or may own, they naturally think of tangible property, including the marital home, and accounts. Perhaps an operating business that one of them owns which conducts activities and generates income to support the family is thought of as an asset as well as an entity. However, the shell of an entity that may be formed after the marriage is not something that a typical engaged couple thinks of as an asset separate and independent of the property that it holds. The antenuptial agreement in this case should be interpreted as it would be by that engaged couple, not as if it were a commercial contract between a lender and a

business-owner, who would be expected to contemplate the “corporate formalities” when choosing language for their contract.

The Court of Appeals correctly interpreted the antenuptial agreement in this case when it determined that assets owned in the name of single member LLCs were not assets owned in Plaintiff-Appellant’s individual name. Thus, the Court of Appeals correctly concluded that the antenuptial agreement in this case does not require classification of all of the assets Plaintiff-Appellant owns in the names of various LLCs as his separate property. Both its interpretation of the agreement and its classification of the assets should be affirmed and the case remanded to the trial court for further proceedings.

B. The Court of Appeals Correctly Held that the Income Earned by the Parties is not Separate Property.

The Court of Appeals also correctly held that “income” is not “property” and that the antenuptial agreement in this case did not classify Plaintiff-Appellant’s income as his separate property. The antenuptial agreement does not mention income in paragraph 5, describing what is separate property in the event of divorce. It does mention income in paragraph 10, describing the disclosures the parties made to each other prior to entering into the agreement. Thus, the Court of Appeals concluded using the doctrine of *expressio unius est exclusio alterius*, income is not included by implication in the classification provisions of paragraph 5. (Slip opinion, page 15.)

Plaintiff-Appellant does not actually challenge the Court of Appeals contract interpretation approach and authority in this regard. He primarily focuses on the preservation issue. It appears to Amicus that the Defendant-Appellee preserved this

issue by refusing to agree to Plaintiff-Appellant's separate property claim – whether the property was an account containing income or some other type of property. While Amicus has no knowledge of where the income was as of the time of trial, it was presumably located in an account of some type, either in Plaintiff-Appellant's name or in the name of an LLC. The Court of Appeals opinion states that the trial court deviated from the Michigan Child Support Formula (Slip opinion, page 6), but made no further mention of child support, so it is apparent that the amounts of Plaintiff-Appellant's income going forward was not at issue and only income earned during the marriage that remains as an asset that can be awarded as part of the property settlement was at issue on appeal.

Certainly, Plaintiff-Appellant income available to pay support will include the income he earns in the form of wages as well as the income available to him in the form of profits from the entities he owns and controls. The extent to which undistributed earnings from the LLCs are income was the subject of the recent Court of Appeals decision in *Diez v Davey*, 307 Mich App 366; 861 NW2d 323 (2014), which will provide the trial court guidance on remand. Moreover, it is in the context of determining what income of the LLCs is to be treated as Plaintiff-Appellant's income that the traditional doctrine of piercing the corporate veil may come into play. If Plaintiff-Appellant attempts to minimize his personal income and enrich the LLCs during the period of time he has the obligation to pay child support and spousal support based on his income, so that he can then withdraw and use the income after that obligation has ended, then use of the corporate form to misleadingly minimize his income to the detriment of a "creditor" or support recipient, is precisely the type of situation where the form can and should be disregarded.

Plaintiff-Appellant's income earned prior to the divorce was correctly classified as marital income by the Court of Appeals. The part of the income that has not been spent was correctly classified by the Court of Appeals as part of the marital estate and subject to appropriate distribution. Remand to the trial court for consideration of what effect this has on the division of the marital estate remains the correct result and should be affirmed.

RELIEF

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

Respectfully submitted,

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