PRESENT: HON. RICHARD E. SISE
Acting Justice
STATE OF NEW YORK
SUPREME COURT COUNTY OF WASHINGTON

HENRY P. OSWALD,

TRIAL
DECISION
Index No.: 18762
RJI No.: 57-1-2011-0389

Plaintiff,

-against-

VICTORIA A. OSWALD,

Defendant.

(Supreme Court, Washington County, Trial Term)

APPEARANCES: John R. Winn, Esq.
Attorney for Plaintiff
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Granville, New York 12832

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(By: Julie M. Frances, Esq.)
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Sise, J.

The parties were married on October 29, 2005 in the Town of Jackson, Washington County in a ceremony performed by a minister of the Universal Life Church (ULC). At the time of the marriage plaintiff was 74 years old and defendant was 63. Defendant moved out of the marital residence in August 2007 but returned in September 2008 and stayed until December

2010. Plaintiff commenced this action in April 2011 by filing a complaint in which he seeks a declaration that the marriage is void and that a prenuptial agreement, executed by the parties three days before the wedding ceremony, is unenforceable. Alternatively, plaintiff seeks a divorce on the ground of irretrievable breakdown of the marriage, enforcement of the prenuptial agreement and equitable distribution. In her answer defendant denies the invalidity of the marriage and asserts a counterclaim for divorce.

MARRIAGE

VALIDITY

Previously, plaintiff moved for summary judgment on the question of the validity of the marriage. The motion was granted on the basis of controlling precedent in *Ranieri v Ranieri* (146 AD2d 34 [2d Dept 1989]) where the court held that a minister of the ULC does not have authority under New York law to solemnize a marriage. On appeal, the determination was reversed, the court finding that questions of fact existed as to whether the officiant had the authority to solemnize the parties' marriage (*Oswald v Oswald*, 107 AD3d 45 [3d Dept 2013]). At trial, the parties presented evidence relevant to the issues of the validity of the marriage, the enforceability of the prenuptial agreement as well as maintenance, equitable distribution and counsel fees.

By statute, no marriage is valid unless it is solemnized by, among others, "a clergy [member] or minister of any religion" (Domestic Relations Law § 11 [1]). "[T]he terms clergy member and minister include a 'person having authority ... from the church or synagogue to

preside over and direct the spiritual affairs of the church or synagogue'" (*Oswald v Oswald*, supra, quoting Religious Corporations Law § 2). On appeal, the court in *Oswald v Oswald* concluded that the officiant at the parties' wedding ceremony was ordained as a minister by the ULC and authorized to conduct the spiritual affairs of the ULC, leaving open only the question of whether the ULC is a "church" within the meaning of the statue.

At trial, plaintiff offered no direct proof on this issue. Defendant, however, offered testimony by Andre Hensley, President of Universal Life Church. Hensley testified that ULC was established in 1959 and is incorporated and headquartered in California. According to Hensley, ULC has only one tenet: to do that which is right, with each person interpreting that directive for themselves as long as it does not infringe on the rights of others. Hensley testified that ULC religious observances include traditional church services and communal gatherings such as a three-day event in a park in Idaho where religious meeting were held each day. While many ministers[1] gather with people at places such as meeting and conference rooms, public parks and private homes, there are ULC brick and mortar churches in New York where worship services are held on certain days at certain times. ULC ministers preside at weddings, funerals and baptisms and they perform laying-on-of-hands healing, house blessings and baby naming ceremonies. They also preach and do ministerial counseling.

RCL § 2 does not require that ministers receive formal training and the standard which defines a "church" is not an exacting one. Religious Corporations Law § 2 defines an

[1] Those authorized by the ULC to preside over and direct its affairs assume a wide variety of titles and the term "minister" is used here as a matter of convenience.

unincorporated church as "a congregation, society, or other assemblage of persons who are accustomed to statedly meet for divine worship or other religious observances, without having been incorporated for the purpose".[2] Hensley testified that a belief in God is not necessary to become a ULC member or minister and, recognizing that divine worship relates to God or a god (Random House Webster's Unabridged Dictionary, 2001), and considering that the only tenet of the ULC is to "do that which is right", the proof does not support a conclusion that ULC congregations and assemblages customarily meet for divine worship. However, the phrase "religious observances" covers a broader range of activity. According to Hensley, ULC ministers involve themselves in many traditional religious observances such as weddings, funerals, house blessings, laying-on-of-hands healing and preaching. In addition, he testified that there are dedicated church buildings where scheduled services, including traditional church services, are held. Taken as a whole, the testimony shows that the purpose of the ULC, and the reason it authorizes ministers, is to facilitate and encourage religious observances. On that basis, the ULC fits the Religious Corporations Law definition of a "church" and the parties' marriage, performed by one of its authorized ministers, is valid.

DIVORCE

Testimony was offered by defendant to show that the relationship between the parties has

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[2]An "incorporated church" is defined in Religious Corporations Law § 2 as "a religious corporation created to enable its members to meet for divine worship or other religious observances". The section also provides that a "religious corporation" as that term is used in the section 2 means a "Religious Corporations Law corporation". As the ULC is incorporated in California, it cannot qualify as an "incorporated church".

broken down irretrievably for a period of at least six months and on that basis defendant is awarded a divorce (see Domestic Relations Law § 170 [7]).

PRENUPTIAL AGREEMENT

Prior to their marriage the parties executed a prenuptial agreement which addresses a variety of issue including identifying marital and non-marital property and each party's right to seek maintenance in the event of a divorce. Defendant contends that the agreement is unenforceable because it lacks definiteness and that it is invalid as the product of duress and emotional coercion and because she had no opportunity to negotiate its terms.

DEFINITENESS

Under Domestic Relations Law §236 (B) (3) "[a]n agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded." Defendant testified that three days prior to the parties' wedding she signed the agreement at the office of attorney Donald McPhee who acknowledged her signature. In challenging the enforceability of the agreement, defendant contends that the contract is missing material terms such that the agreement is unenforceable. The doctrine of definiteness is well established and means that a court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to since if an agreement is not reasonably certain in its material terms, there is no binding contract (*166 Mamaroneck Ave. Corp. v 151 East Post Rd. Corp.*, 78 NY2d 88 [1991]). However, "[w]here it is clear from the language of a contract that

the parties intend to be bound and the court has available 'an objective method for supplying a missing term, the court should make the effort to hold the parties to their bargain'" (*Marshall v Khan*, 53 AD3d 765, 766 [3d Dept 2008] quoting *Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 [1991],). "Striking down a contract as indefinite and in essence meaningless is at best a last resort" (*Matter of 166 Mamaroneck Ave. Corp.* at 91 citation and internal quotation omitted).

The prenuptial agreement was prepared by the husband. In addressing the issue of marital and non-marital property the agreement refers to an attached schedule which lists property owned by plaintiff prior to the marriage and another schedule which purports to list the pre-marital property of defendant. However, as defendant points out, the schedule listing her separate property is not attached to the agreement. The clause in the agreement, which refers to the missing schedule, provides that the items listed are the separate property of defendant within the meaning of Domestic Relations Law § 236 (B).[3] The provision goes on to allow that plaintiff waives any claim to the present value of such property as well as the appreciation in the value of such property and any interest or income earned by reason of such property. Inasmuch as the statute and the agreement define separate property in the same way, and given that the statute further provides that separate property shall remain such (Domestic Relations Law § 236 [B] [5] [b]), the real purpose of the provision is to insure that any appreciation in the value of, and

[3]Separate property as defined by the statute means, among other things not relevant here, "property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse" (Domestic Relations Law § 236 [B] [1] [d] [1]).

interest or income from, separate property is treated as separate property. Consequently, the itemization meant to be provided by the missing schedule is not a material term of the contract because, by definition, the separate property of either party can be identified as such by reference to the date it was acquired. Therefore, even if the information in the missing schedule is a material term, the missing information can be supplied by referring to the acquisition date; an objective extrinsic event and one of the two methods used by the courts to satisfy the requirement of definiteness in the absence of an explicit contract term (*Matter of 166 Mamaroneck Ave. Corp.* at 91-92).

In addition, defendant argues that, because the provision of the agreement in which the name of the attorney who represented her in negotiating the agreement is blank, the contract is unenforceable. However, the credible proof, adduced by defendant, shows that defendant was not represented and the absence of information regarding representation is an accurate reflection of the circumstances. To the extent that the question of defendant's representation, or lack of it, is material to the enforceability of the parties' agreement, the issue is one of overreaching on the part of plaintiff and is addressed below.

VALIDITY

"It is well settled that a prenuptial agreement is accorded the same presumption of legality as any other contract and the validity of such an agreement is presumed unless the party opposing the agreement comes forward with evidence demonstrating fraud, duress, or overreaching, or that the agreement or stipulation is . . . unconscionable" (*Darrin v Darrin*, 40 AD3d 1391, 1392-93 [3d Dept 2007] lv dismissed 9 NY3d 914 [2007] citations and internal quotations omitted). The

setting aside of a prenuptial agreement is the exception rather than the rule, and the burden of establishing fraud, duress or overreaching is on the party seeking to set aside the agreement (*Anonymous v Anonymous*, 123 AD3d 581, 582 [1st Dept 2014]).

The agreement is not challenged on the grounds that plaintiff committed fraud or that its terms are unconscionable. Rather, defendant maintains that the circumstances surrounding its execution support a finding that she signed it under duress and as a result of overreaching on the part of plaintiff. Defendant points out that the agreement was presented to her three days before the wedding, which approximately 75 people were attending, and told by plaintiff that he would not go through with the wedding unless she signed the agreement. A claim of duress requires proof that threats allegedly made by one party deprived the other of the ability to act in furtherance of his or her own interests, or deprived him or her of the ability to exercise their own free will (*Lyons v Lyons*, 289 AD2d 902, 904 [3d Dept 2001]). Such proof requires the party challenging the agreement to show "that threats of an unlawful act compelled his or her performance of an act which he or she had the legal right to abstain from performing"(*id.*, at 904). As a matter of law, the exercise or threatened exercise of a legal right does not constitute duress (*Colello v Colello*, 9 AD3d 855 [4th Dept 2004]) and consequently, plaintiff's refusal to go through with the wedding without the signed agreement is not proof of duress. In addition, the testimony by defendant that plaintiff intimidated her is contrary to her testimony that she signed the agreement without reading it because she trusted him. Furthermore, defendant testified that she had an opportunity to read the agreement, that McPhee told her she could have another lawyer, one with experience in these matters, advise her and that she had time to see another

lawyer but decided not too. The circumstances as testified to by defendant do not constitute overreaching such that the agreement should be set aside (*see Mesiti v Mongiello*, 84 AD3d 1547 [3d Dept 2011]; *Marin-Brown v Brown,* 79 AD3d 1302 [3d Dept 2010]).

MAINTENANCE

The prenuptial agreement contains a waiver by each party to any claim for maintenance in the event that either party seeks a divorce.

EQUITABLE DISTRIBUTION

Except where the parties have provided in an agreement for the disposition of their property, the court, in an action for divorce, is authorized to determine the respective rights of the parties in their separate and marital property and to provide for its disposition in the final judgment (Domestic Relations Law § 236 [B] [5] [a]). Although there is a valid prenuptial agreement in place, defendant contends that there exists certain items of property, listed in the premarital agreement, and not, that are marital property subject to equitable distribution. Marital property subject to equitable distribution is "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action ..." (Domestic Relations Law § 236 [B] [1] [c]). "[P]roperty acquired during the marriage is presumed to be marital property, and the party seeking to establish that a particular item is indeed separate property bears the burden of proof in this regard" *(Mula v Mula,* 131 AD3d 1296, 1299 [3d Dept 2015] quoting, *Seidman v Seidman*, 226 AD2d 1011, 1012

[3d Dept 1996]).

There is one item listed as the separate property of plaintiff in schedule A of the prenuptial agreement that defendant contends is marital property: an account with Glens Falls National Bank with a balance of $100,000. Though not explicitly stated by defendant, the claim is premised on the invalidity of the prenuptial agreement which argument has been rejected. However, there are eleven other items titled in the plaintiff's name but claimed by defendant as marital property and that do not appear in Schedule A of the prenuptial agreement. Those items include two bank accounts, an annuity, security for a loan, two shares of Bank of America stock, a mortgage held by plaintiff, three life insurance policies and a 2000 Buick automobile purchased by plaintiff in 2013. All eleven items can be found in a Statement of Net Worth executed by plaintiff on June 17, 2014. The only proof offered to show dates of acquisition is found in the plaintiff's statement of net worth. Ten of those items list an acquisition date prior to the date of the marriage or after the date the action was commenced. Moreover, defendant has not shown that those items of property acquired by plaintiff prior to the marriage, separate property by statutory definition, or any part of them, were transformed into marital property (*cf. Johnson v Chapin*, 12 NY3d 461 [2009] [appreciation in the value of separate property due to the contributions or efforts of the non-titled spouse will be considered marital property]; *Cassara v. Cassara*, 1 AD3d 817 [3d Dept 2003] [transferring separate property funds into a joint account]). The remaining item, a mortgage acquired on property in Fort Edward, admits an acquisition date after the date of the marriage and before this action was commenced. As plaintiff has not offered any proof that the mortgage is not marital property, it is subject to equitable distribution (see

Mula v Mula, at 1299).

Issues of equitable distribution are resolved by the court in the exercise of its discretion after examining the circumstances of the case and the pertinent statutory factors (see Domestic Relations Law § 236 [B] [5] [d]). Such factors include consideration of the income and property acquired by the parties during the marriage. Contributions made by both spouses, "including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party" are relevant (Domestic Relations Law § 236 [B] [5] [d] [6]). The length of the marriage, the parties' health, and whether there will be an award of maintenance are also taken into account (see Domestic Relations Law § 236 [B] [5] [d]).

The parties were married for five and one-half years before this action was commenced and lived apart for sixteen months of that time. Plaintiff was 74 years old at the time of the marriage and defendant was 63. The value of the assets each had acquired prior to the marriage was substantially in favor of the plaintiff as was their respective earning potential. However, no award of maintenance is being made and defendant testified to performing some uncompensated work related to plaintiff's law practice. Given these considerations defendant is entitled to a twenty-five percent share of the mortgage or $11,150.00.

COUNSEL FEES

Under Domestic Relations Law § 237 (a) counsel fees may be awarded to a spouse "to enable that spouse to carry on or defend the action or proceeding as, in the court's discretion,

justice requires, having regard to the circumstances of the case and of the respective parties." Factors which may be considered concern the relative financial circumstances of the parties, including any distributive award, the complexity of the case and the extent of legal services rendered together with all the other circumstances of the case including the relative merit of the parties' positions (*Armstrong v Armstrong*, 72 AD3d 1409, 1416 [3d Dept 2010]; *Blay v Blay*, 51 AD3d 1189, 1193 [3d Dept 2008]). Where, as here, the divorce action was commenced on or after October 12, 2010, a rebuttable presumption exists that counsel fees shall be awarded to the less monied spouse (Domestic Relations Law § 237 [a]).

In this instance, defendant is the less monied spouse. Plaintiff's statement of net worth from June 2014 shows net assets of $1.27 million. Defendant's statement from December 2014 shows a net worth of $64.8 thousand and only a minimal distributive award is made. The case presented two complex issues: the validity of the marriage and the validity of the prenuptial agreement. Both issues raised legitimate subjects for litigation and neither party can be faulted for pursuing their respective positions regarding them. Nonetheless, resolving the issues elevated each party's counsel fees far beyond what would otherwise be expected. Considering the far superior financial position of plaintiff and the approximately $56,000 in legal fees incurred by defendant, an award of $24,500.00 in counsel fees is appropriate.

Plaintiff is directed to submit, on notice to defendant, a proposed Judgment containing provisions consistent with this Decision.

ENTER.

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Dated: Albany, New York
June 9, 2016

Richard E. Sise
Acting Supreme Court Justice