Orphans' Court for Worcester County
Estate No. 18571

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2053

September Term, 2021

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RITVA ESPENKOTTER

v.

THE ESTATE OF BERNHARD A.

ESPENKOTTER

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Leahy,
Zic,
Ripken,

JJ.

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Opinion by Ripken, J.

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Filed: November 23, 2022

Appellant, Ritva Espenkotter ("R.E."), appeals an order of the Orphans' Court of Worcester County, which found in favor of her deceased husband, Bernhard A. Espenkotter's Estate ("B.E." or the "Estate"). Following a hearing, the orphans' court issued an order holding that the Postnuptial Agreement ("Agreement") entered into by the parties in December of 2003 was valid. Additionally, the orphans' court denied R.E.'s election for the elective share of B.E.'s Estate. This timely appeal followed.

## ISSUES PRESENTED FOR REVIEW

R.E. presents a single issue for our review, which we have rephrased for clarity:[1] Did the orphans' court err in determining that the Agreement was valid and enforceable? For the reasons to follow, we remand with instructions to the orphans' court to make factual findings as to whether a confidential relationship existed between the parties and, if so, whether the Estate has met its burden to prove that the Agreement was fair and equitable.

## FACTUAL AND PROCEDURAL BACKGROUND

R.E. and B.E. (collectively "the parties") were married on January 18, 1985 in Hauppauge, New York. Each party had been previously married, and both had children from their previous marriages. R.E. was born, raised and educated in Finland, where she obtained her Bachelor of Arts and a master's degree. In 1960, R.E. was hired as a flight attendant by Pan-American and moved to the United States. R.E. subsequently worked in various roles in the travel industry. B.E. was born in Germany and obtained his Juris

[1] Rephrased from: "Whether the Orphan's Court's Determination that a Postnuptial Agreement was Valid and Enforceable to Waive Appellant's Claim for her Statutory Elective Share was clearly erroneous."

Doctorate degree from a university in Germany. The parties met while R.E. was seeking employment with Lufthansa Airlines, where B.E. worked as the Vice President of North American Operations. In 1993, the parties moved from New York to Berlin, Maryland, to live in a home recently purchased by B.E. that was titled in his sole name. After the parties moved to Maryland, R.E. stopped working. In 1994, with R.E.'s knowledge and agreement,[2] B.E. conveyed his interest in his Berlin property to his children, reserving a life estate for himself.

During their marriage, the parties maintained separate bank accounts. All of R.E.'s income from her prior employment was deposited into her individual bank account and used for her personal expenses. After she retired in 1993, R.E.'s social security income was deposited into her individual bank account. R.E. named her children as beneficiaries on her bank account, ensuring that they would be entitled to "whatever [she] [had] left." Similarly, B.E. had his own bank account, but he paid for all of the parties' living expenses.

In 2003, R.E. engaged an attorney to assist her with estate planning. R.E.'s attorney prepared various estate planning documents, including R.E.'s Last Will and Testament, Power of Attorney, and Living Will Declaration, which R.E. executed on December 30, 2003. With respect to R.E.'s Power of Attorney, R.E. testified that she designated her daughter because she trusted her, but she did not trust her husband because "he had lied to [her] about so many things." R.E. also excluded B.E. from her Last Will and Testament,

[2] With respect to the ownership of the home, R.E. testified that: "[] [B.E.] appeared on the house and we discussed that and he wanted [his] children to have the house. [B.E] asked me if I would agree to that and I said yes."

leaving her estate to her children. In her testimony, R.E. explained that she "wanted to [] make sure that [her] children were entitled to everything," such as her personal possessions.

R.E.'s attorney prepared the Agreement,[3] which is the subject of the instant appeal. The parties executed the Agreement on December 30, 2003. Pursuant to the Agreement, the parties waived their respective rights to claim an elective share in each other's estates, with the exception of R.E. reserving her rights in B.E.'s German pension.[4] The attorney's secretary signed the Agreement as a witness. The secretary testified that she knew who the parties to the Agreement were, as she had met them prior to December 30, 2003—the day on which they executed the Agreement. Moreover, the secretary indicated that before she notarized the Agreement, she confirmed R.E.'s identity by checking her identification.

Subsequently, in early January of 2004, B.E. sent a letter to his children enclosing a copy of his Last Will and Testament,[5] which he executed on December 31, 2003, a copy

[3] A copy of the Agreement is contained in the record, with a handwritten note stating, "This agreement was prepared by my wife's Lawyer and ratified in her office and witnessed by one of her employees." The note contains the name and address of the attorney who prepared the Agreement. The note appears to have been written by B.E.

[4] The Agreement states that, "[R.E.] shall receive the surviving spouse entitlement with respect to [B.E.'s] pension." [RE 12] R.E. currently receives the pension benefits referenced in the Agreement in the amount of $1,650.00 per month. However, both R.E. and her daughter testified that B.E. had two German pensions, that R.E. was currently receiving one of the pensions, and that she expected to receive the second one, which was still pending.

[5] Although not explicitly stated in the record before us, R.E.'s attorney does not appear to have prepared B.E.'s Last Will and Testament that was executed on December 31, 2003 for several reasons. First, the document contains a different font and format than the Agreement and R.E.'s various other estate planning documents that were executed on December 30, 2003. Second, B.E.'s Last Will and Testament was executed on a different

of the Agreement, and a list of his assets as of that time.[6] B.E.'s letter to his children stated that he and R.E. "signed an agreement in which [they] [] waived all rights which one might have upon death of the other including the right of an 'elective share.'" His letter also indicated that his remaining assets would be distributed to his children in equal shares. The list of assets included several savings accounts, a checking account, an IRA account, a life insurance policy, real estate and personal property.

Thereafter, B.E. updated his Last Will and Testament, which he executed on May 29, 2015.[7] Consistent with the Agreement executed by the parties in 2003, B.E.'s Last Will and Testament contained the following provision:

> I am married to R.E. … I have intentionally made no provisions for my Wife under this Will since she has waived all rights in my probate and non-probate estate, except for my pension, under that certain Agreement dated December 30, 2003.

The Last Will and Testament executed on May 15, 2015 contained further language revoking any prior "Wills and Codicils" and declaring to be B.E.'s Last Will and Testament.

B.E. passed away on November 28, 2020. R.E. subsequently filed an Election to

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date. Lastly, B.E.'s Last Will and Testament was signed by two different witnesses than the witnesses to the documents prepared by R.E.'s attorney. It is also worth noting that the Last Will and Testament executed on December 31, 2003 did not contain the name of an attorney or a law firm.

[6] The document was titled "Assets of Bernhard Espenkotter as per 1/2004."

[7] Again, although not explicitly stated in the record before us, it is apparent that B.E. engaged his own attorney to prepare his updated Last Will and Testament. The document contains a footer with the name of the law firm that prepared it, which differs from that of the attorney who prepared R.E.'s estate documents. Moreover, the document was signed and notarized by different witnesses than R.E.'s estate documents.

Take Statutory Share of Estate, indicating that she "renounce[d] all provisions of [her] spouse's will pertaining to [her]self and elect[ed] to take [her] statutory share of the estate." The Personal Representative of the Estate, B.E.'s son from his prior marriage, filed a Response to R.E.'s Election to Take Statutory Share of the Estate, asserting that R.E. had waived her rights to her statutory elective share pursuant to the parties' Agreement. Following an evidentiary hearing on November 16, 2021, the orphans' court issued an order, holding that the Agreement was valid, and denied R.E.'s election for the elective share of B.E.'s Estate. The order read as follows:

> **ORDERED,** by the Orphans' Court for Worcester County Maryland that the Agreement prepared by [] and witnessed by [], dated, and executed December 30, 2003, between Bernhard A. Espenkotter (now deceased) and Ritva Espenkotter, his wife, is **VALID.**
>
> **ORDERED,** that the Petition for Order and Determination in Augmented Estate for Purposes of Determining Spousal Share, filed on May 6, 2021, by [], Esquire, on behalf of her client, Ritva Espenkotter, is hereby **DENIED.**
>
> **ORDERED,** that the Petitioner's Motion for Summary Judgment, filed October 27, 2021, and Petitioner's Motion to Strike the Estate's Response to Petitioner's Motion for Summary Judgment and Cross Motion for Summary Judgement filed on November 22, 2021, by [], Esquire, on behalf of her client, Ritva Espenkotter, are hereby **DENIED.**
>
> **ORDERED**, the Response to Petitioner's Closing Memorandum filed December 13, 2021, by [], Esquire, on behalf of her client, [], is hereby **GRANTED.**
>
> **ORDERED,** there being no further issues to administer under this estate, the estate shall close.

R.E. filed this timely appeal.

## DISCUSSION

When, as in this case, an action is tried without a jury,[8] our standard of review is dictated by Maryland Rule 8-131(c). Pursuant to Rule 8-131(c), we "review the case on both the law and the evidence." We give due regard to the trial court's judgment of the witnesses' credibility and will not set aside the judgment unless it is clearly erroneous. *See* Md. Rule 8-131(c). "It is well settled that the findings of fact of an Orphans' Court are entitled to a presumption of correctness." *Pfeufer v. Cyphers*, 397 Md. 643, 648 (2007) (internal citations and quotations omitted). On the other hand, "interpretations of law by [an Orphans' Court] are not entitled to the same presumption of correctness on review: the appellate court must apply the law as it understands it to be." *Id*. Accordingly, we review an Orphans' Court's legal conclusions de novo. *See id*. (citing *Banks v. Pusey*, 393 Md. 688, 697) (2006)). We "do not make factual findings or substitute the factual findings [we] would rather the trial court have made[.]" *Hartford Fire Ins. Co. v. Est. of Sanders*, 232 Md. App. 24, 39 (2017).

### I. THE ORPHANS' COURT DID NOT MAKE FACTUAL FINDINGS IN CONCLUDING THAT THE POSTNUPTIAL AGREEMENT WAS VALID AND ENFORCEABLE.

According to R.E., because she was married to B.E. at the time of his death, she is entitled to her statutory elective share pursuant to Maryland Code section 3-403 of the Estates and Trusts Article. Section 3-403 provides that, "[t]he surviving spouse may elect

[8] In asserting the standard of review, R.E. incorrectly suggests that the lower court granted summary judgment. The record is clear that the lower court made its findings and entered an order after a hearing, with testimony from 6 witnesses and consideration of 12 exhibits introduced into evidence. As set forth in the lower court's order, R.E.'s Motion for Summary Judgment was denied.

to take an elective share of an estate subject to election as follows: (1) If there is surviving issue, the elective share shall equal one-third of the value of the estate subject to election, reduced by the value of all spousal benefits; or (2) If there is no surviving issue, the elective share shall equal one-half of the value of the estate subject to election, reduced by the value of all spousal benefits." Md. Code Ann., Est. & Trusts § 3-403. Under the Estates and Trusts Article, "[t]he right of election of a surviving spouse may be waived before or after marriage by a written contract, agreement, or waiver signed by the party waiving the right of election." Est. & Trusts § 3-406(a). The Estate asserts that R.E. waived her right to an elective share of her late husband's estate pursuant to the Agreement. However, R.E. disputes the validity of the waiver contained in the Agreement and contends that the Agreement was not valid.

A postnuptial agreement is similar to an antenuptial agreement in that it is a contract between a married couple "that sets forth the rights, duties and responsibilities of the parties during and upon termination of the marriage through death or divorce." *McGeehan v. McGeehan*, 455 Md. 268, 297 (2017) (internal quotations omitted) (quoting Cynthia Callahan & Thomas C. Ries, *Fader's Maryland Family Law* § 14-15 (6th ed. 2016)). Such agreements are enforceable and are "generally held to be binding when they are shown to be fair and regular and not unconscionable or the product of fraud, duress, mistake or undue influence[.]" *McGeehan*, 455 Md. at 298 (quoting 7 Williston on Contracts § 11:7 (4th ed. 2017)). The fairness of an agreement is analyzed in the context of the agreement at the time it was made and not on the basis of conditions occurring subsequently. *Martin v. Farber*, 68 Md. App. 137, 144 (1986).

In considering whether the subject Agreement is valid, the Court of Appeals's decision in *Canon v. Canon* is instructive.[9] 384 Md. 537 (2005). In *Canon*, the parties executed an antenuptial agreement prior to their marriage and after the wife filed for divorce, she sought to have the agreement set aside. *See id*. In evaluating the validity of the antenuptial agreement at issue, the Court of Appeals, relying on an earlier version of *Fader's Maryland Family Law*,[10] articulated five "considerations":[11]

> (1) fair and equitable in procurement and result; (2) parties must make frank, full and truthful disclosure of all their assets; (3) the agreement must be entered voluntarily, freely and with full knowledge of its meaning and effect; (4) the importance of independent legal advice in evaluating whether the agreement was voluntarily and understandingly made is emphasized; (5) there is a confidential relationship between the parties which, if a contest to validity occurs, shifts the burden of proof to the one attempting to uphold the agreement to prove that it is fair and equitable.

*Id*. at 550 n.6; *see also McGeehan*, 455 Md. at 295 n.15.

The finding of a confidential relationship between the parties is a prerequisite to determining whether the agreement was a product of undue influence or duress. *Lloyd v.*

[9] Although *Canon* involved the validity of an antenuptial agreement, as stated *supra*, the Court of Appeals has determined that postnuptial agreements are similar to antenuptial agreements.

[10] The Court of Appeals explained in a footnote that Mrs. Cannon's five factor test was taken from John F. Fader, II, and Richard J. Gilbert's *Maryland Family Law*, which summarized what it considered five "important considerations to determine the validity of a premarital agreement." The Court further noted that although they did not know which edition the Circuit Court relied upon in its reasoning, they "refer[red] to the Third Edition, originally published in 1990 and updated with a 2004 Cumulative Supplement. *Cannon*, 384 Md. at 550 n.6.

[11] These are the same considerations R.E. encourages us to evaluate in determining whether the Agreement was valid.

*Niceta*, No. 934, Sept. Term 2021, slip op. at 23 (Md. Ct. Spec. App. October 26, 2022). "That is so because the burden of proof shifts depending on whether the parties were in a confidential relationship." *Id.* slip op. at 23 (internal citations omitted).

R.E. argues that there was a confidential relationship between the parties, and therefore, that the burden of proof should shift to the Estate to prove that the Agreement was fair and equitable. R.E. further asserts that there was not a fair and equitable procurement of the Agreement, there was not a full and truthful disclosure of B.E.'s assets[12] at the time the Agreement was entered, the Agreement was not entered into voluntarily, freely and with full knowledge of its meaning and effect, and finally, that she never discussed the Agreement with her attorney. The Estate responds that a confidential relationship did not exist between the parties, and that the orphans' court correctly held that the Agreement was valid.

We note at the outset that we are unable to determine whether the Agreement was valid and enforceable, as the orphans' court did not make any factual findings, either on the record or in its order, following the evidentiary hearing. The orphans' court issued a one-page order, holding that the Agreement executed by the parties on December 30, 2003 was valid, and denied R.E.'s election for the elective share of B.E.'s estate. Notably, the order did not contain an analysis or a conclusion of whether a confidential relationship

[12] In support of her position, R.E. suggests that she was unaware of B.E.'s assets and that she simply signed the couple's joint income tax returns. According to R.E., the January 2004 letter B.E. sent to his children enclosing a list of his assets confirmed he had substantial assets at the time the Agreement was executed.

existed between the parties. Without a factual finding as to the existence of a confidential relationship, we are unable to determine which party bore the burden of proof in establishing that the Agreement was fair and equitable. It therefore follows that we are unable to evaluate the remaining *Canon* considerations in determining the validity of the Agreement.

Because the orphans' court order did not contain the necessary factual findings, we remand. On remand, we instruct the orphans' court to make findings of fact based on the record. It is within the orphans' court's discretion to determine if additional argument is necessary. The orphans' court should make factual findings as to whether a confidential relationship existed among the parties. If the orphans' court determines that a confidential relationship existed, the burden of proof rests on the Estate to have proven that the Agreement was fair and equitable and the orphans' court should analyze the evidence that has been presented in that context. Conversely, if the orphans' court does not find there was a confidential relationship, the burden of proof was with R.E. and the orphans' court is to analyze the evidence that was presented in that context.

**JUDGMENT OF THE ORPHANS' COURT FOR WORCESTER COUNTY IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE EVENLY SPLIT BETWEEN APPELLANT AND APPELLEE.**