

COMMENTARY

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Beware of Language of Disclosure Clauses in Property Settlement Agreements

Many property settlement agreements contain disclosure clauses that acknowledge full disclosure of assets by both parties and/or waive further disclosure of assets. Despite the language contained in these provisions, family law practitioners have taken solace in 23 Pa. C. S. Section 3505(d) constructive trust for undisclosed assets, which provides an equitable remedy in the event a party fails to disclose an asset. This code section gives the court power to divide this later discovered asset. Even though the property settlement agreement contains disclosure clauses, many practitioners, including me, assume that this code section will be applied in the event an undisclosed asset is later discovered.

Bennett v. Bennett, 2017 Pa. Super 253, decided Aug. 4, rejects this assumption. In *Bennett*, 19 years after the property settlement agreement was executed, the wife filed a petition seeking to invoke 23 Pa. C.S.A. 3505(d), arguing that the husband failed to disclose the existence of a pension earned during the marriage. She argued that she learned through the parties' daughter that the husband was receiving pension benefits in the monthly amount of \$1,785. The Superior Court found that the wife could not argue lack of disclosure, as the language of the agreement provided that she was fully aware of the assets of the husband.

23 Pa. C. S. Section 3505(d) does not require a showing of intentional nondisclosure. Therefore, if the court finds that this code section does not apply because the property settlement agreement provides that full disclosure has been made, the presumption of full disclosure can only be overcome by clear and convincing evidence of fraud or duress. The presumption cannot be overcome with evidence of mutual mistake or an unintentional omission.

The disclosure language of the property settlement agreement in *Bennett* provided

of them may have with respect to any property, property interest or asset.

The agreement did not specifically enumerate the marital assets or how they were divided.

The Bucks County trial court, which heard the wife's petition, granted the wife's request and found that she was entitled to 50 percent of the husband's pension benefit. The Superior Court reversed.

In reaching its decision, the Superior Court relied upon *Lugg v. Lugg* 64 A. 3d 1109 (2013). *Lugg* held that where the wife

extent of the marital estate when she signed the agreement. Stated another way, the trial court concluded that the wife should not be bound by the disclosure recital because she was not actually familiar with all of the marital assets that she certified knowing about ... the wife cannot negate the recital affirming her knowledge of the marital estate based upon a subsequent assertion that she did not know the full extent of the assets when she executed the certification."

The husband disputed the wife's claim that she was not aware of his pension at the time of the execution of the property settlement agreement. But the Superior Court found that a credibility determination was not necessary given that the express language of the agreement controlled.

Query whether the result would have been different if instead of a catch-all phrase waiving the assets of the other party, all of the assets of the parties, with the exception of the pension, were specifically enumerated in the agreement. Based on the reasoning of *Bennett* it should not have made a difference; the disclosure language of the agreement should be strictly enforced. However, if an asset is omitted from a specific list of assets, a court may be reluctant to strictly enforce the terms of a disclosure clause.

A petition for allowance of appeal of this decision was filed with the Supreme Court of Pennsylvania. Regardless of whether the Supreme Court decides to hear this case on appeal, practitioners need to be mindful that courts may strictly enforce the language of disclosure clauses in property settlement agreements. If the practitioner wishes to preserve claims under the remedial provisions of 23 Pa.C.S. Section 3505(d), the agreement should specifically provide for this. •

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as follows: "Each party has made a full and complete disclosure to the other of his, and her entire assets and liabilities, and each is informed and familiar with the property, estate and assets, earnings and income of the other.

The agreement went on to provide: "The parties have previously divided to their mutual satisfaction all items ... of tangible personal property, household furnishings, motor vehicles, bank accounts, investments, business interests, stocks, securities, retirement accounts, insurance policies and all other assets which, as between the parties, are or may be subject to equitable distribution, and each party does hereby release and relinquish any and all claims that either

expressly waived disclosure in the property settlement agreement, she could not later void the terms of the agreement for lack of disclosure. The *Bennett* court stated "Like the *Lugg* court, we find herein that the wife cannot negate the recital affirming her knowledge of the marital estate based upon her subsequent assertion that she did not know the full extent of the assets when she executed the certification."

The court went on to explain the error of the trial court: "the lynchpin of the trial court's logic is that, notwithstanding the wife's explicit recognition of full disclosure, she should be excused from this provision because she believed that she knew the

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