

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 4, 2023 Session

FILED
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Clerk of the
Appellate Courts

DENNIS N. ETHEREDGE ET AL. v. ESTATE OF DORIS ETHEREDGE

**Appeal from the Chancery Court for Putnam County
No. 2019-49 Ronald Thurman, Chancellor**

No. M2022-00451-COA-R3-CV

A husband and wife each had multiple children from prior relationships. After their marriage, the husband and wife agreed to a contract that would control the distribution of their estates, with funds passing first to the surviving spouse and then to be distributed after the second spouse's death among their children. Both husband and wife have since died. Husband's children brought suit, arguing that the distribution of assets in husband's final will is contrary to the contract. Awarding summary judgment to husband's children in this declaratory judgment action, the trial court determined that the distribution of the husband's estate is controlled by the terms of the contract. The wife's estate appealed. We vacate and remand.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Vacated;
Case Remanded**

JEFFREY USMAN, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

Henry D. Fincher, Cookeville, Tennessee, for the appellant, Estate of Doris Etheredge.

Charles Michels, Nashville, Tennessee, for the appellees, Dennis N. Etheredge, Evelyn Charlotte Crane, Larry Etheredge, Tammy Etheredge, and Cinde Etheredge Lucas.

OPINION

Doris Etheredge (Wife) and Nathan Etheredge (Husband) were married for more than forty years. This was a second marriage for both. Husband and Wife both had biological children from their previous marriages. Wife had two children: Tim Cook and Karen Brown (Wife's Children). Husband had five children: Dennis Etheredge, Evelyn

Crane, Larry Etheredge, Tammy Etheredge, and Cinde Lucas¹ (Husband's Children).

In 1989, which was after they had married, Wife and Husband entered into an *Agreement to Devise Property* (Couple's 1989 Agreement or Agreement). The Couple's 1989 Agreement provides, in part, the following:

WHEREAS, the undersigned parties to this Agreement are married to each other and wish to enter into a binding agreement that will control the disposition of their respective estates at the death of each;

WHEREAS, the undersigned parties to this Agreement desire this Agreement to be irrevocable in the absence of a separate written agreement between the parties that specifically revokes this Agreement that shall be signed by both parties in the presence of two witnesses and a Notary Public;

WHEREAS, the undersigned parties to this Agreement fully understand that any will or testament executed in contravention of this agreement shall have no legal effect to dispose of the parties' respective probate estates;

NOW, THEREFORE, in consideration of the premises and mutual obligations contained herein, the parties hereto agree as follows:

1. Each of the undersigned parties to this Agreement shall execute separate wills with each such will providing for the devise of substantially all of their respective property in excess of the unified credit equivalent provided under Section 2010 of the Internal Revenue Code of 1986 (the "Code") owned at the time of death to the survivor or in trust for the exclusive benefit of the survivor during his or her lifetime with the remainder interest passing equally between the parties' children or their issue, and the survivor shall devise substantially all of his or her property owned at death, together with substantially all of the property received from his or her predeceased spouse by reason of death, as the case may be, to be divided equally between the parties' children in equal shares with the children of any deceased child taking the share of their deceased parent, pro rata.

2. The will of each of the parties to this agreement shall make specific reference to this agreement, shall set forth the material provisions hereof and shall incorporate this agreement by reference in their wills.

3. The survivor of the parties hereto shall not commit waste of their property

¹ Cinde Lucas's first name is alternately spelled "Cindy" in various places in the record. In accordance with the case caption, this court is using the "Cinde" spelling.

nor of property the survivor receives under the terms of this Agreement. In addition, the survivor of the parties hereto shall not make gifts of such property or transfers for less than an adequate and full consideration to persons other than the children of the parties hereto and the descendants of such children and any organization described in Section 501(c)(3) of the Code. Provided, however, that any gifts or transfers for less than an adequate and full consideration to the children of the parties hereto or to the children's descendants shall be made equally between such children and for their descendants based upon the fair market value of the transferred property determined at the children's level.

4. This Agreement is irrevocable in the absence of a written agreement between the undersigned parties that specifically revokes this agreement and is signed by the parties in the presence of two witnesses and a Notary Public.

5. "Children" of the parties shall include only Karen Brown, Tim Cook, Evelyn Etheredge Crane, Larry Etheredge, Dennis N. Etheredge, [Cinde] Etheredge Dale, and Tammy Etheredge.

...

The Couple's 1989 Agreement was signed by both Wife and Husband and notarized.

In subsequent years, Wife and Husband both executed multiple wills. Each of these wills complied with the terms of the Couple's 1989 Agreement until at least 2015. In 2015, both Wife and Husband executed new wills. Pursuant to the terms of Husband's 2015 Will, Husband left his estate in its entirety to his Wife, if she should survive him, with Wife's Children as beneficiaries if Wife should not survive him. The Husband's 2015 Will stated, in part, the following:

I, WILLIAM NATHAN ETHEREDGE, a resident of Putnam County, Tennessee, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking and rendering null and void any and all prior Wills and/or Codicils thereto heretofore executed by me.

...

Section 4.1 I hereby declare that the Beneficiaries of my estate as follows:

Section 4.1.1 My wife, DORIS EILEEN (BURCHFIELD) ETHEREDGE;

Section 4.1.2 If and only if my wife, DORIS EILEEN (BURCHFIELD) ETHEREDGE, should predecease me, I give my estate to my step-children

TIM COOK and KAREN BROWN, in equal shares, share and share alike.

Section 4.2 I am fully aware that I have other children, specifically including EVELYN E. CRANE, LARRY ETHEREDGE, DENNIS N. ETHEREDGE, TAMMY ETHEREDGE, and [CINDE] E. LUCAS. For reasons known to them, I do not want any of my estate to go to any of them or their survivors. I make this decision after long thought and consideration, and I ask them to accept my decision and to reflect upon the reasons I feel it is necessary to make it.

Husband died in April 2018. At the time of his death, the Husband's 2015 Will was his final will. Wife submitted Husband's 2015 Will to probate, and it was admitted in June 2018. In accordance with its terms, Husband's estate passed to Wife, as she survived him. This step was provided for in both Husband's 2015 Will and the Couple's 1989 Agreement.

In March 2019, Husband's Children filed a declaratory judgment action against Wife seeking to have the trial court declare that the disposition of Husband's estate was controlled by the Couple's 1989 Agreement. Wife passed away in 2021. Her estate was timely substituted in this litigation.

Wife's Estate and Husband's Children filed cross motions for summary judgment. The trial court granted the Husband's Children's motion for summary judgment and denied the Wife's Estate's motion for summary judgment. In doing so, the trial court determined that (1) the Couple's 1989 Agreement was a valid, binding contract; (2) this contract required Husband and Wife to execute wills leaving everything to each other and then their collective seven children; (3) this contract is irrevocable except through a specific written revocation signed by both Husband and Wife in the presence of two witnesses and a notary public; (4) the contract has not been revoked; (5) the contract controls the disposition of Husband and Wife's estates; (6) there was adequate consideration for Husband and Wife to enter into the Agreement; (7) Husband passed away in April 2018; and (8) Husband's Children's declaratory judgment action was a timely and proper legal procedure for addressing their interests under the Couple's 1989 Agreement.

Wife's Estate appealed the decision of the trial court and has raised multiple issues on appeal. One, Wife's Estate contends that Husband's Children do not qualify as third-party beneficiaries and thus cannot properly maintain this action. Two, Wife's Estate argues that the trial court errantly failed to make required findings as to nine questions that it posed and sought to have answered by the trial court. Three, Wife's Estate asserts that the Couple's 1989 Agreement is invalid because it is irrevocable. Four, Wife's Estate argues that the Agreement was properly revoked via the Couple's 2015 wills. Five, Wife's Estate contends that the intent of the Couple's 1989 Agreement was limited to safeguarding against a spouse disinheriting the biological children of the other spouse not their own biological children. Six, Wife's Estate asserts that Husband's intent as expressed through

his 2015 will trumps any constraint arising from the Couple's 1989 Agreement. Seven, Wife's Estate argues that as a postnuptial agreement the Couple's 1989 Agreement was subject to protective requirements including that it was knowingly entered into by Husband and Wife.

Husband's Children contend that Wife's Estate is mistaken with regard to each of these arguments. They also argue that Wife's Estate has waived all of her issues on appeal by failing to properly cite to the record. Additionally, they point to four issues that they assert Wife's Estate has specifically waived.

I.

Turning first to our standard of review, this court "review[s] a trial court's decision on a motion for summary judgment de novo, with no presumption of correctness." *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). Accordingly, we must "make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *See id.* We must "view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor." *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; *Rye*, 477 S.W.3d at 251.

II.

Turning to the parties' arguments, Husband's Children contend that it is unnecessary for this court to consider the merits of all or at least some of the arguments advanced by Wife's Estate on appeal because of waiver by Wife's Estate. Husband's Children raise waiver arguments in two different forms. One, Husband's Children assert that Wife's Estate has waived all of her issues on appeal by failing to properly cite to the record. Two, Husband's Children note that there are four specific arguments in Wife's Estate's brief that have been waived. With regard to waiver of its entire appeal, Wife's Estate asserts that there is nothing referenced in its brief that is not contained in the record and that its brief cites the record by noting the particular document or motion rather than a page in the record. In defending its record citation approach, Wife's Estate references the availability of the index to the technical record to be utilized when making and locating the referenced record materials. Wife's Estate adds that if record citation in such a manner is in error that this is unknowing mistake of counsel and such a mistake should not result in dismissal of the clients' appeal. As for the more limited waiver argument advanced by Husband's Children, their contention that Wife's Estate has waived four particular issues, Wife's Estate argues these matters were raised before the trial court and have been properly raised on appeal.

Wife's Estate's manner of citing to the record does not accord with Tennessee Rule of Appellate Procedure 27(g), which provides that "[e]xcept as provided in rule 28(c), reference in the briefs to the record shall be to the pages of the record involved." *See also, e.g., In re Navada N.*, 498 S.W.3d 579, 604 n.16 (Tenn. Ct. App. 2016) (noting that Rule 27 "requires citation to specific page numbers in the record"). There is, however, a public policy preference for addressing appeals on the merits. *See, e.g., Cannistra v. Brown*, No. M2021-00833-COA-R3-CV, 2022 WL 4461772, at *4 n.3 (Tenn. Ct. App. Sept. 26, 2022); *Lacy v. Hallmark Volkswagen Inc. of Rivergate*, No. M2016-02366-COA-R3-CV, 2017 WL 2929502, at *3 (Tenn. Ct. App. July 10, 2017); *Patterson v. State*, No. M2016-01498-COA-R3-CV, 2017 WL 1103042, at *1 (Tenn. Ct. App. Mar. 24, 2017). This court has discretion to consider a case that is subject to dismissal for violation of Rule 27 on the merits. *See, e.g., Cannistra*, 2022 WL 4461772, at *4 n.3; *Finley v. Wettermark Keith, LLC*, No. E2020-01081-COA-R3-CV, 2021 WL 3465865, at *3 n.1 (Tenn. Ct. App. Aug. 6, 2021); *Weakley v. Franklin Woods Cmty. Hosp.*, No. E2020-00591-COA-R3-CV, 2020 WL 7861248, at *3 (Tenn. Ct. App. Dec. 22, 2020). Husband's Children concede that this court has discretion regarding how to address Wife's Estate's improper citation to the record, and they ask the court to exercise that discretion so as to find that all of the Wife's Estate's arguments have been waived, effectively dismissing Wife's Estate's appeal.

In this case, given the nature of the arguments presented, the specific record materials relevant to assessing these arguments, and the record itself, the error in approach to record citation by Wife's Estate has not imposed meaningful prejudice to the Husband's Children or any meaningful burden upon this court. Wife's Estate's arguments, which present questions of law not fact, essentially require review in the record of only a few documents which in total amount to less than twenty pages and which are readily located within the record. Consequently, despite the failure to adhere to Rule 27, we have determined that the better course in this case is to exercise this court's discretion in a manner that results in considering the issues raised by Wife's Estate on appeal on the merits rather than dismissing her appeal entirely based upon her failure to properly cite to the record. *Cannistra*, 2022 WL 4461772, at *4 n.3 (exercising discretion to consider an appeal on the merits despite violation of Rule 27 where "there is no prejudice to the opposing party nor to the administration of justice").

As for Husband's Children's more limited waiver argument, there are four specific issues identified by the Husband's Children as having been waived by Wife's Estate: (1) whether the authenticity of the Couple's 1989 agreement has been established, (2) whether Husband's Estate's suit was an untimely and a procedurally improper mechanism for challenging a will, (3) whether the trial court erred in denying a motion for a judgment on the pleadings, thereby improperly failing to dismiss Husband's Children's suit, and (4) whether the Couple's 1989 Agreement was intended only to protect against disinheriting the biological children of the other spouse.

With regard to the first three issues, we agree with the argument of Husband's Children that, to the extent these issues have been asserted at all in Wife's Estate's brief, they have been waived. These issues neither appear in Wife's Estate's statement of the issues presented on appeal nor are arguments developed or supported with appropriate authority. As stated by the Tennessee Supreme Court "an issue may be deemed waived when it is argued in the brief but is not designated as an issue in accordance with Rule 27(a)(4). It also may be deemed waived when it has been expressly raised as an issue, but the brief fails to include an argument satisfying the requirements of Rule 27(a)(7)." *City of Memphis v. Edwards by & Through Edwards*, No. W2022-00087-SC-R11-CV, 2023 WL 4414598, at *2 (Tenn. July 5, 2023). At most, Wife's Estate's brief offers conclusory assertions as to each of the first three issues identified as having been waived. "It is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her. . . ." *Sneed v. Bd. of Pro. Resp. of Supreme Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010). Rather, "[i]n our adversarial system, the judicial role is . . . to serve as arbiters of legal questions presented and argued by the parties before them." *State v. Bristol*, 654 S.W.3d 917, 924 (Tenn. 2022). Simply stated, Wife's Estate has not constructed arguments as to the first three specific issues noted by Husband's Children as having been waived. Additionally, Wife's Estate's failed to include these issues in its statement of issues. Unlike the errant approach to citation to the record discussed above, which was not prejudicial to the opposing party, to consider issues raised in the manner Wife's Estate has raised the first three issues would work a clear prejudice to Husband's Children. Their brief quite properly did not engage with these issues on the merits, and instead quite properly argued that they had been waived. With regard to the fourth issue, we conclude that this contention has not been waived by Wife's Estate. It falls within the ambit of an issue identified in Wife's Estate's statement of the issues, and she has developed an argument in her brief as to this contention, which we address and ultimately reject on the merits below.

III.

Turning to Wife's Estate's arguments in opposition to the trial court's grant of summary judgment to Husband's Children, we begin with Wife's Estate's argument that Husband's Children do not qualify as third-party beneficiaries.² As its basis for this

² Regarding third-party beneficiaries, the Tennessee Supreme Court has stated the following:

[A] nonparty may be deemed an intended third-party beneficiary of a contract . . . entitled to enforce the contract's terms, if:

- (1) The parties to the contract have not otherwise agreed;
- (2) Recognition of a right to performance in the [third party] is appropriate to effectuate the intention of the parties; and
- (3) The terms of the contract or the circumstances surrounding performance indicate that either:

contention, Wife's Estate argues that Husband's Children were disinherited in Husband's 2015 will, and, therefore, have no standing to seek to enforce the Couple's 1989 Agreement. This argument begs the question. One of Aristotle's original thirteen fallacies of reasoning, begging the question "is generally defined by modern writers as consisting in the assumption of what is to be proved in order to prove it; in other words, assuming as a premise for an argument the very conclusion that is sought to be proved."³ Wife's Estate's argument assumes the ineffectualness of the Couple's 1989 Agreement in preventing Husband's 2015 Will from validly disinheriting Husband's Children. This assumption, in turn, becomes the basis to deny third-party beneficiary status standing to Husband's Children under the Couple's 1989 Agreement, as to which they are undisputedly third-party beneficiaries. Wife Estate's argument assumes the answer to the question that is before this court and in doing so improperly begs the question.

IV.

Wife's Estate also contends that the trial court erred by granting summary judgment without making factual findings requested by Wife's Estate. Husband's Children argue that the trial court did not err. They note that it is Tennessee Rule of Civil Procedure 52.01 that addresses required factual findings by trial courts, not Tennessee Rule of Civil Procedure 56.04, which was cited by the Wife's Estate in advancing its argument. This is of significance, according to Husband's Children, because Rule 52.01 is expressly inapplicable to summary judgment motions. Further developing its argument, Wife's Estate contends that the trial court's order granting summary judgment was insufficiently thorough and failed to apply the relevant law to the case. Husband's children respond that the trial court actually ruled on multiple matters that Wife's Estate asserts were unaddressed and that a number of the questions noted by Wife's Estate as having been unaddressed are related to matters that have been waived on appeal.

Husband's Children are correct that it is Rule 52.01 rather than 56.04 that addresses mandatory factual findings and that Rule 52.01 is expressly inapplicable to motions for summary judgment. Under Rule 56.04, however, a trial court in granting or denying a motion for summary judgment "shall state the legal grounds upon which the court denies or grants the motion." The trial court "has a duty to ensure that its rulings are adequately

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- (a) the performance of the promise will satisfy an obligation or discharge a duty owed by the promisee to the [third party]; or
 - (b) the promisee intends to give the [third party] the benefit of the promised performance.

Wallis v. Brainerd Baptist Church, 509 S.W.3d 886, 899 (Tenn. 2016) (quoting *Owner-Operator Indep. Drivers Ass'n v. Concord EFS, Inc.*, 59 S.W.3d 63, 68 (Tenn. 2001)).

³ Andrew Jay McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. Colo. L. Rev. 741, 781 (1988).

explained,” *Vaughn v. DMC-Memphis, LLC*, No. W2019-00886-COA-R3-CV, 2021 WL 274761, at *11 (Tenn. Ct. App. Jan. 27, 2021), so as to avoid creating a circumstance in which an appellate court is “left to guess as to why the trial court reached its conclusion.” *Calzada v. State Volunteer Mut. Ins. Co.*, No. M2020-01697-COA-R3-CV, 2021 WL 5368020, at *8 (Tenn. Ct. App. Nov. 18, 2021).

There are nine questions that Wife’s Estate asserts the trial court failed to address and by doing so, according to Wife’s Estate, failed to adequately explain its ruling. These questions include:

1. Was the 2015 Last Will and Testament of Nathan Etheredge a valid will?
2. Had anyone filed a will contest to the 2015 Last Will and Testament of Nathan Etheredge within the two (2) year statute of limitations for such challenges?
3. Does the 2015 Last Will and Testament of Nathan Etheredge express his clear intent to disinherit his own natural children from inheriting from his estate?
4. Did the 1989 Postnuptial Agreement contain any indication that the parties knew the nature and extent of each other’s estate when it was signed?
5. Is the irrevocability clause of the 1989 Postnuptial Agreement enforceable?
6. Does the 1989 Postnuptial Agreement require that it be expressly mentioned by name in order to be revoked?
7. Would the 2015 Last Will and Testament of Nathan Etheredge operate to disinherit his children from taking under his estate, but for the Court’s interpretation of the 1989 Postnuptial Agreement?
8. Did the 2015 Last Will and Testament of Doris Etheredge express an intent to disinherit Mr. Nathan Etheredge’s children from taking under it?
9. Were both Nathan Etheredge and Doris Etheredge’s wills (a) in writing (b) expressing an intent to disinherit Nathan Etheredge’s children (c) signed in front of two witnesses and a Notary Public?

We conclude the trial court did not violate the requirement under Rule 56.04 to state the legal grounds upon which the court granted the motion for summary judgment. Questions 1, 3, 7, and 8 relate to the validity of the Husband’s 2015 Will and whether it

would have served to disinherit Husband's Children in the absence of Couple's 1989 Agreement. While the trial court could have ruled upon these matters and there would have been some potential benefit in reaching conclusions thereupon, doing so was unnecessary to the decision the trial court reached and thus is unnecessary to explaining its decision. That is because the trial court concluded the Couple's 1989 Agreement was valid and prevented Husband's 2015 Will, whatever its intent or effect in the absence of the Couple's 1989 agreement, from disinheriting the Husband's Children. Given the basis of the trial court's decision, it was not error under Rule 56.04 for the trial court to decline to rule on questions 1, 3, 7, and 8. As for question 2, Husband's Children point out that the trial court ruled that their method of seeking to preserve their interest in the estates via a contract right based declaratory judgment action was both proper in form and timely filed. Furthermore, Husband's Children note that Wife's Estate has failed to challenge this ruling by the trial court on appeal and has thereby waived any objection to the trial court's ruling as to the method and timing of their challenge in connection with Husband's 2015 Will. We conclude that Husband's Children are correct on both points. The trial court ruled and Wife's Estate failed to develop and support a challenge to this ruling on appeal. Thus, any objection in connection with question 2 has been waived. With regard to question 5, the trial court also ruled on this question. The trial court concluded that the contract was not actually irrevocable but instead set forth a procedure for revocation, which the trial court concluded was enforceable. With regard to questions 6 and 9, as noted by Husband's Children, the trial court did explain the basis for its ruling for why the Husband's 2015 Will did not validly revoke Couple's 1989 agreement. Finally, with regard to question 4, the trial court embraced the Husband's Children's argument that it was unnecessary to demonstrate knowledgeable entry into the contract and instead that consideration for the agreement was sufficient to render it a valid postnuptial agreement. For reasons addressed below, we conclude that the trial court erred in its conclusion on this question of law. Nevertheless, for purposes of compliance with Rule 56.04's requirement to explain the legal grounds for the court's decision, the trial court's conclusion rendered ruling upon question 4 unnecessary rather than a violation of Rule 56.04's requirement for the trial court to explain the grounds for its ruling.

V.

We turn next to Wife's Estate's direct assault on the validity of the Couple's 1989 Agreement. Wife's Estate raises five arguments against the validity of the Couple's 1989 Agreement and contends that each of these five grounds is independently sufficient to render the Agreement ineffectual to prevent the Husband from disinheriting his children via his 2015 Will. Wife's Estate contends the trial court erred in rejecting each of these contentions. One, Wife Estate asserts that the irrevocability provision of the Couple's 1989 agreement is invalid under Tennessee law and thus cannot constrain the Husband from disinheriting his children via his 2015 Will. Two, the Wife's Estate argues that the Couple's 1989 Agreement was properly revoked pursuant to its own revocation terms. Three, Wife's Estate asserts that the intent of the Couple's 1989 Agreement was to prevent

either Husband or Wife from being able to disinherit the biological children of the other spouse not their own biological children. Four, Wife's Estate contends that the clear intent of Husband's 2015 will was to disinherit his children and that his intent as expressed therein should control over the Couple's 1989 Agreement. Five, Wife's Estate contends that the agreement did not adhere to the requirements of postnuptial contracts because Wife did not knowingly enter into the Couple's 1989 Agreement. Husband's Children argue that the trial court did not err in ruling contrary to the position of Wife's Estate as to each of these issues.

A. Irrevocability

Wife's Estate contends that Couple's 1989 Agreement is invalid because parties cannot agree under Tennessee law to an irrevocable contract. Husband's Children note that the Couple's 1989 Agreement is not actually irrevocable. The Couple's 1989 Agreement allows for revocation, providing for specific and relatively easily satisfied requirements for revoking the Agreement so long as both parties agree to do so. Consequently, even assuming for purposes of argument the correctness of Wife's Estate's position regarding irrevocability of contracts, the Couple's 1989 Agreement is not actually irrevocable. Accordingly, the Couple's 1989 agreement is not invalid based on its purported irrevocability.

B. Revocation

Wife's Estate contends the Husband and Wife revoked their 1989 Agreement, asserting they did so through a combination of both of their 2015 wills. Husband's Children argue that the couple did not validly revoke their 1989 Agreement pursuant to the terms of the revocation provision thereof.

With regard to revocation, the Couple's 1989 Agreement provides as follows:

WHEREAS, the undersigned parties to this Agreement desire this Agreement to be irrevocable in the absence of a separate written agreement between the parties that specifically revokes this Agreement that shall be signed by both parties in the presence of two witnesses and a Notary Public;

...

This Agreement is irrevocable in the absence of a written agreement between the undersigned parties that specifically revokes this agreement and is signed by the parties in the presence of two witnesses and a Notary Public.

The Couple's 1989 Agreement expressly addresses the impact of a will drafted in contravention of the provisions of the agreement. It states "the undersigned parties to this Agreement fully understand that any will or testament executed in contravention of this agreement shall have no legal effect to dispose of the parties' respective probate estates."

The revocation provisions of the Agreement require that any revocation must specifically revoke the Couple's 1989 Agreement. Husband and Wife's 2015 Wills make no reference to the Couple's 1989 Agreement. Thus, even accepting for purposes of argument the contention that revocation was possible through combining the Couple's 2015 wills, simply stated, there is no specific revocation, which is required for valid revocation. Furthermore, the Agreement's terms for revocation provide for revocation via a single document, "a separate written agreement" signed by both Husband and Wife. The Husband and Wife's 2015 wills are two separate documents not one, and neither document is individually signed by both the Husband and Wife. Additionally, the reference in the Couple's 1989 Agreement to revocation through "a separate written document" read within the context of the agreement appears to be a reference to requiring revocation through a document that is not a will. For the above discussed reasons, there was not a valid revocation of the Couple's 1989 Agreement.

C. Contractual Interpretation

Wife's Estate also contends the intent of the Couple's 1989 Agreement was to prevent each spouse from being able to disinherit the biological children of the other spouse; therefore, the agreement should not be understood as a barrier to the Husband's 2015 Will disinheriting his own children. The Tennessee Supreme Court in its 2019 decision in *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tennessee, Inc.* extensively explored Tennessee's approach to contract interpretation. 566 S.W.3d 671 (Tenn. 2019). Addressing Tennessee decisions on contract interpretation, the Tennessee Supreme Court, therein stated, in part, the following:

Tennessee courts' increased emphasis on textual principles represents a clear rejection of the extreme contextual approach. . . . Tennessee cases have also eschewed an extreme textual approach. Instead, they reflect balance; they demonstrate a definite focus on the written words in the parties' contract, but they also consider evidence related to the situation of the parties and the circumstances of the transaction in interpreting those words. For example, in *Penske Truck Leasing Co. v. Huddleston*, the Court said: "The intention of the parties is to be determined by a fair construction of the terms and provisions of the contract, by the subject matter to which it has reference, by the circumstances of the particular transaction giving rise to the question, and by the construction placed on the agreement by the parties in carrying out its terms." . . . Following *Penske*, the Court in *Hughes v. New Life Development Corp.* stated, "The search for the parties' intent should focus on the four corners of the contract, the circumstances in which the contract was made, and the parties' actions in carrying out the contract." . . . This Court has similarly held that discerning the contracting parties' intentions includes taking into consideration their situation, their motivations, their respective

interests, and other contextual circumstances. *See, e.g., City of Columbia v. C.F.W. Constr. Co.*, 557 S.W.2d 734, 739 (Tenn. 1977) (“The evidence of intent is to be found in the language used by the parties . . . considered in the light of their respective interests and other relevant circumstances . . . and in the practical construction given to it by the parties. . . .”); *Kroger Co. v. Chem. Secs. Co.*, 526 S.W.2d 468, 471 (Tenn. 1975) (“While this lease contract cannot be varied by oral evidence ‘the course of previous dealings, the circumstances in which the contract was made, and the situation of the parties as aids in determining the meaning of the contract—are matters proper to be looked to by the court in arriving at the intention of the parties to the contract.’”) . . . ; *Ashley v. Volz*, 218 Tenn. 420, 404 S.W.2d 239, 242 (1966) (holding that the parties’ “intention may be ascertained by looking to the situation of the parties; the motives which induced the agreement; and the objects and purposes designed to be effected thereby”); *Petty*, 277 S.W.2d at 360 (“In getting at [the parties’] intention we of course do not determine what the state of the mind was of the parties at the time the contract was executed but rather what their intention was as actually embodied and expressed in the instrument as written.”); *Stevenson v. Lima Locomotive Works*, 180 Tenn. 137, 172 S.W.2d 812, 814 (1943) (“The intention of the parties . . . must be found in the contract itself, as well as the situation of the parties . . . and use of the subject matter of the contract.”).

In *Hamblen County v. City of Morristown*, [the Tennessee Supreme] Court considered extrinsic evidence in the form of the parties’ post-contract behavior, i.e., the rule of practical construction. . . . The Court used language that approved consideration of extrinsic evidence of context, even for interpretation of a contract that seemed facially unambiguous, with the important qualification that such evidence cannot be used to modify, expand, or restrict the contract:

The court in interpreting words or other acts of the parties puts itself in the position which they occupied at the time the contract was made. In applying the appropriate standard of interpretation even to an agreement that on its face is free from ambiguity it is permissible to consider the situation of the parties and the accompanying circumstances at the time it was entered into—not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning to be given to the agreement. *Hamblen Cnty.*, 656 S.W.2d at 334 (quoting Restatement of Contracts § 235(d) and comment); *see also Burress v. Sanders*, 31 S.W.3d 259, 265 (Tenn. Ct. App. 2000) (quoting Bryan A. Garner, *The Elements of Legal Style* 7 (1991)) (noting that “everything [in contract interpretation]

hangs on context and purpose”).

Some of the cases with the strongest language on contextual principles also use textual principles as well, and vice-versa. In *Hughes*, the Court used language approving the use of evidence on “the circumstances in which the contract was made, and the parties’ actions in carrying out the contract,” . . . , but then used the extrinsic evidence primarily to “buttress” the interpretation of the text of the contract. . . . In *Petty v. Sloan*, often cited for its strong language in support of the textual approach, the Court went on to describe extrinsic evidence in the record and explicitly consider it: “In reading and studying this contract we of course must construe it with reference to the situation of the parties, the business to which the contract relates and the subject matter as appears from the words used.” . . .

Looking at the broad range of Tennessee contracts cases, it is clear that Tennessee courts have sought, albeit imperfectly, to achieve balance in contract interpretation. The central principle endures, to interpret contracts so as to ascertain and give effect to the intent of the contracting parties. . . . In effectuating this principle, our courts have noted that judges “are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so as to judge of the meaning of the words and of the correct application of the language to the things described.” . . . Courts should not be “shut out from the same light which the parties enjoyed when the contract was executed.” . . .

However, the strong strain of textualism in Tennessee caselaw demonstrates resolve to keep the written words as the lodestar of contract interpretation. . . . Tennessee has rejected firmly any notion that courts are a fallback mechanism for parties to use to “make a new contract” if their written contract purportedly fails to serve their “true” intentions. . . . Tennessee courts “give primacy to the contract terms, because the words are the most reliable indicator—and the best evidence—of the parties’ agreement when relations were harmonious, and where the parties were not jockeying for advantage in a contract dispute.” . . .

In short, Tennessee cases cite both textualist and contextualist principles; consideration of context evidence does not eclipse other canons of contract interpretation but rather cooperates with them. Thus, as in other states, Tennessee’s jurisprudence on contract interpretation “evades tidy classification as textualist or contextualist.”

Individual Healthcare Specialists, Inc., 566 S.W.3d at 692-94.

We consider Wife's Estate's argument regarding the Couple's intent within the framework for contract interpretation set forth by the Tennessee Supreme Court. In developing its argument on appeal, Wife's Estate references no language in the Couple's 1989 Agreement that corresponds with its understanding of the Husband and Wife's intent as being limited to preventing the disinheritance of their biological children by the other spouse. Nor does Wife's Estate point to any language in the Couple's 1989 Agreement that it asserts is ambiguous and subject to being read in a manner consistent with Wife's Estate's understanding of Husband and Wife's intent. In other words, assessed in terms of the language of the contract, Wife's Estate's offers neither a textual basis to support its understanding or even language that is purported to be ambiguous and amenable to its understanding. Additionally, on appeal, Wife's Estate offers no reference to any evidentiary support that this was Husband and Wife's actual intent; rather, Wife's Estate relies on a conclusory surmise that it is necessarily so that parents will only want to safeguard their own biological children from being disinherited. The plain language of the Couple's 1989 Agreement is not in accord with Wife's Estate understanding of the Couple's 1989 Agreement. Furthermore, human relations are far too complex to make this leap in the dark in contravention of the plain language of the Agreement based solely on Wife's Estate's conclusory surmise that parents will necessarily intend to protect only the inheritance interests of their own biological children. Husband's 2015 Will provides an immediate contrary example to this assumption.

D. Husband's Intent in his 2015 Will

Turning to Husband's 2015 Will, Wife's Estate contends that the clear intent of Husband's 2015 Will was to disinherit his children and that intent should govern the distribution of his estate. The Tennessee General Assembly, however, has authorized parties to enter into binding contracts to make a will. *See* Tenn. Code Ann. § 32-3-107. Wife's Estate's argument would render such contracts a nullity in the State of Tennessee with parties free to modify the distribution of their estates with contractual constraints being of no consequence when they are contrary to the intent of a testator who no longer wishes to honor such a contract. Wife's Estate's intent argument leans upon the importance of intent in the interpretation of wills. Its argument, however, fails to offer any support for the position that the intent at the time of making a will trumps and displaces preexisting obligations imposed in accordance with a binding contract to make a will.

E. Postnuptial Agreement and Knowledgeable Entry

Wife's Estate characterizes the Couple's 1989 Agreement as a postnuptial agreement. As a matter of statutory and common law, Wife's Estate argues that, as a postnuptial agreement, the Couple's 1989 Agreement is subject to protective limitations, notably that it must be entered into knowingly in order to be valid. Wife's Estate references Tennessee Code Annotated section 36-3-501 as statutorily imposing this

requirement upon postnuptial agreements. Tennessee Code Annotated section 36-3-501 provides as follows:

Notwithstanding any other law to the contrary, except as provided in § 36-3-502, any antenuptial or prenuptial agreement entered into by spouses concerning property owned by either spouse before the marriage that is the subject of such agreement shall be binding upon any court having jurisdiction over such spouses and/or such agreement if such agreement is determined, in the discretion of such court, to have been entered into by such spouses freely, knowledgeably and in good faith and without exertion of duress or undue influence upon either spouse. The terms of such agreement shall be enforceable by all remedies available for enforcement of contract terms.

Addressing principles of statutory interpretation, the Tennessee Supreme Court has stated the following:

First, the most basic principle of statutory construction is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope. To fulfill this directive, we begin with the statute's plain language. When the statutory language is clear and unambiguous, we must apply its plain meaning in its normal and accepted use. A statute is ambiguous when the parties derive different interpretations from the statutory language. However, this proposition does not mean that an ambiguity exists merely because the parties proffer different interpretations of a statute. A party cannot create an ambiguity by presenting a nonsensical or clearly erroneous interpretation of a statute. In other words, both interpretations must be reasonable in order for an ambiguity to exist. If an ambiguity exists, however, we may reference the broader statutory scheme, the history of the legislation, or other sources to determine the statute's meaning. We avoid constructions that place one statute in conflict with another and endeavor to resolve any possible conflict between statutes to provide for a harmonious operation of the laws.

In re Neveah M., 614 S.W.3d 659, 676 (Tenn. 2020) (quoting *State v. Frazier*, 558 S.W.3d 145, 152-53 (Tenn. 2018)).

Tennessee Code Annotated section 36-3-501, by its express terms, applies to “any antenuptial or prenuptial agreement.” Nowhere in this statutory measure are postnuptial agreements referenced. Prenuptial agreements and antenuptial agreements are agreements “made before marriage usu. to resolve issues of support and property division if the marriage ends in divorce or by the death of a spouse.” *Prenuptial Agreement*, Black's Law Dictionary 1372 (10th ed. 2014). Alternatively, postnuptial agreements are “entered into during marriage” not before. *Postnuptial Agreement*, Black's Law Dictionary 1356 (10th

ed. 2014). Accordingly, if postnuptial agreements must be “entered into . . . knowledgeably,” then that requirement does not arise directly from a statutory imposition by the Tennessee General Assembly under Tennessee Code Annotated section 36-3-501.

Wife’s Estate argues that a postnuptial agreement must have been entered into knowledgeably to be valid in accordance with the Tennessee Supreme Court’s decision in *Bratton v. Bratton*, 136 S.W.3d 595 (Tenn. 2004). Wife’s Estate’s argument for a common law, rather than statutory, imposition of this requirement, stemming from a prior decision of the Tennessee Supreme Court, rests on ground that is much more solid. The Tennessee Supreme Court in *Bratton* stated the following:

[P]ostnuptial agreements will be treated in the same manner as antenuptial and reconciliation agreements. That is to say, they should be interpreted and enforced as any other contract. All contracts must be supported by adequate consideration, and agreements between spouses or potential spouses are no exception. As a general rule, consideration for a contract may be either a benefit to the promisor or a detriment to, or an obligation upon, the promisee. Marriage itself is sufficient consideration for a prenuptial agreement. . . . Similarly [with regard to reconciliation agreements], reconciliation in the face of an impending separation or divorce may be adequate consideration. However, with a postnuptial agreement, the marriage itself cannot act as sufficient consideration because past consideration cannot support a current promise. Therefore, there must be consideration flowing to both parties as part of a postnuptial agreement.

Additionally, part of a postnuptial agreement must be built-in safeguards to protect from fraud, coercion or undue influence due to the confidential relationship between the parties to the contract. Tennessee Code Annotated section 36-3-501 (2001) requires that in order to be enforceable, antenuptial agreements must be entered into freely, knowledgeably, in good faith, and without the exertion of duress or undue influence. This Court has explained the need for such safeguards with respect to antenuptial agreements as follows: “An engagement to marry creates a confidential relation between the contracting parties and an antenuptial contract entered into after the engagement and during its pendency must be attended by the utmost good faith. . . .”

Because of the confidential relationship which exists between husband and wife, postnuptial agreements are likewise subjected to close scrutiny by the courts to ensure that they are fair and equitable. . . . [S]ee also 41 C.J.S. Husband & Wife § 87 (1991) (“Since a husband and wife do not deal at arm’s length, a fiduciary duty of the highest degree is imposed in transactions between them.”). As explained by the court in *Estate of Gab*,

While it is lawful and not against public policy for husband and wife to enter into such contracts, yet they are not dealing with each other as strangers at arm's length. The relationship of husband and wife is one of special confidence and trust, requiring the utmost good faith and frankness in their dealings with each other. . . . Transactions of this character are scrutinized by the courts with great care, to the end that no unjust advantage may be obtained by one over the other by means of any oppression, deception, or fraud. Courts of equity will relieve against any unjust advantage procured by any such means, and less evidence is required in such cases to establish the fraud, oppression, or deception than if the parties had been dealing at arm's length as strangers. . . .

Bratton, 136 S.W.3d at 600-01. The *Bratton* Court stated that “[i]n summary, we hold that postnuptial agreements are valid so long as there is adequate consideration for the agreement, *it is knowledgeably entered into*, and there is no evidence of fraud, coercion or duress.” *Id.* at 605 (emphasis added).⁴ Consequently, where an agreement is a postnuptial agreement, the Tennessee Supreme Court has indicated that its holding in *Bratton* requires that the agreement must have been “knowledgeably entered into” in order to be valid. *Id.* In other words, “in addition to the general rules . . . pertaining to contracts related to wills, antenuptial and postnuptial agreements must also meet the test of their own special category of contracts.”⁵

Drawing upon *Black's Law Dictionary*, the *Bratton* Court defined postnuptial agreements as follows:

While entered into by spouses after marriage, they differ from reconciliation agreements in that they are entered into before marital problems arise. Like both antenuptial and reconciliation agreements, postnuptial agreements seek

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To protect both spouses in the postnuptial agreement context, the *Bratton* court implemented antenuptial safeguards and held that spouses must clear these equitable hurdles that are most necessary when contracting parties do not deal at arm's length. The *Bratton* decision mandates that Tennessee courts protect the values of fairness and equity by demanding postnuptial agreements be supported by consideration, each spouse enter the agreement knowledgeably, and that the agreement be free of any fraud, coercion, or duress.

Paul Brewer, Note, *Family Law-Bratton v. Bratton: The Tennessee Supreme Court Considers Postnuptial Agreements and Allows Married Parties to Agree That They May Eventually Disagree*, 35 U. Mem. L. Rev. 579, 602 (2005).

⁵ 5 Mo. Prac., Probate Law & Practice § 51 (3d ed.)

to determine the rights of each spouse in the other's property, spousal support, and related issues in the event of divorce or death.

Bratton, 136 S.W.3d at 599. Agreements to make wills so as to enshrine the protection of rights of children is one of the purposes of postnuptial agreements,⁶ and postnuptial contracts to make a will are not uncommon.⁷

Husband's Children do not argue that the agreement is not a postnuptial agreement; to the contrary, in their briefing before this court, they presume that it is a postnuptial agreement.⁸ Husband's Children instead emphasize that the *Bratton* case is fundamentally about the issue of consideration, and they argue that there was adequate consideration in this case. The trial court concluded that the postnuptial agreement was valid on exactly this basis. Having noted that the Couple's 1989 Agreement was signed, the trial court stated the following: "Defendant presents no evidence to rebut the presumption of adequate consideration and therefore the Agreement is not an invalid postnuptial Agreement." Wife's Estate has not argued the insufficiency of consideration as a basis for invalidity on appeal. Accordingly, we accept that there was adequate consideration in the present case.

There is a gulf, however, between the existence of adequate consideration and Husband's Children's contention that they do not need to demonstrate that the Couple's 1989 Agreement was knowledgeably entered into by Husband and Wife. Husband's Children's discussion of consideration ignores that the Tennessee Supreme Court addressed the requirements for a valid postnuptial agreement in the *Bratton* case beyond the question of consideration. Their argument also ignores that the Tennessee Supreme Court expressly summarized its decision and identified its holding in *Bratton* as follows: "[W]e hold that postnuptial agreements are valid so long as there is adequate consideration for the agreement, *it is knowledgeably entered into*, and there is no evidence of fraud,

⁶ Linda J. Ravdin, *Postmarital Agreements: Validity and Enforceability*, 52 Fam. L.Q. 245, 247 (2018).

⁷ 5 Williston on Contracts § 11:7 (4th ed.); *see also* Stephen T. Gary, *To Agree or Not to Agree: Treatment of Postnuptial Agreements Under Oklahoma Law*, 63 Okla. L. Rev. 779, 811 (2011) (asserting that "attempting to define property rights is the most common situation in which a postnuptial agreement is used"); *cf. Book Review: Lindley and Parley on Separation Agreements and Antenuptial Contracts*, 37 Real Prop. Prob. & Tr. J. 45, 49-50 (2002) (noting that contract to make a will provisions are "often found in premarital agreements"); 19 Wash. Prac., Fam. And Community Prop. L. § 16:18 (stating that "[p]renuptial agreements usually contain provisions concerning disposition of assets upon the death of a party. This should be construed as an estate planning document but rather as a contract to make a will . . ."); 17 Fla. Jur 2d Decedents' Property § 140 (indicating that "[a]n antenuptial agreement may constitute a valid contract to make a will").

⁸ As noted above, "[i]t is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her . . ." *Sneed*, 301 S.W.3d at 615. Rather, "[i]n our adversarial system, the judicial role is . . . to serve as arbiters of legal questions presented and argued by the parties before them." *Bristol*, 654 S.W.3d at 924.

coercion or duress.” *Bratton*, 136 S.W.3d at 605 (emphasis added). We fail to apprehend how Husband’s Children’s argument regarding consideration, which as noted above we assume is satisfied, displaces the requirement to show that the postnuptial agreement was “knowledgeably entered into” as required by the Tennessee Supreme Court’s *Bratton* decision.

While not a direct challenge to the applicability of the knowledge requirement, Husband’s Children briefly, in a single sentence resting upon a single interwoven citation, suggest that Wife’s Estate must demonstrate an undue influence in order for the burden to be upon them to prove knowledgeable entry into the Couple’s 1989 Agreement rather than upon Wife’s Estate to show the absence of such knowledge. Problematically for Husband’s Children, the case relied upon by Husband’s Children in advancing its argument was expressly designated by the Tennessee Supreme Court as not for citation. Under Tennessee Supreme Court Rule 4(E)(1), “[i]f an application for permission to appeal is hereafter denied by this Court with a ‘Not for Citation’ designation, the opinion of the intermediate appellate court has no precedential value.” Unless there is an applicable exception, of which none are present in this case, “[a]n opinion so designated shall not be published in any official reporter nor cited by any judge in any trial or appellate court decision, or by any litigant in any brief, or other material presented to any court. . . .” Tenn. Sup. Ct. R. 4(E)(2). Accordingly, this argument is not properly before this court and is deemed waived.

In finding that the Couple’s 1989 agreement is a valid, binding contract and awarding summary judgment to the Husband’s Children, the trial court implicitly rejected the argument advanced before the trial court and on appeal by Wife’s Estate’s that, to be a valid postnuptial agreement, the Couple’s 1989 Agreement needed to have been knowledgeably entered into by Husband and Wife. The trial court rejected that argument, accepting Husband’s Children’s argument that adequate consideration alone was sufficient to render the postnuptial agreement valid. The trial court, thereby, failed to address the question of whether the parties knowledgeably entered into their Agreement. The combination of the procedural posture of the case, the state of the record on appeal, the nature and extent of the arguments from the parties, the parties’ citation to the record and failure to do so, and the trial court’s failure to address the knowledgeable entry question prevent this court from determining whether the agreement was knowledgeably entered into by Husband and Wife. Assessed within the framework of the issues and arguments presented to this court, we conclude that the trial court erred by concluding that the Couple’s 1989 Agreement could be a valid postnuptial agreement without considering whether it was knowledgeably entered into by the Husband and Wife. Remand is necessary to allow for a determination of whether the Couple’s 1989 Agreement was knowledgeably entered into by Husband and Wife.

VI.

For the reasons discussed above, the judgment of the trial court is vacated, and the case is remanded for such further proceedings as may be necessary consistent with this opinion. Costs of this appeal are taxed to the Appellees, Evelyn Charlotte Crane, Cinde Etheredge Lucas, Dennis N. Etheredge, Larry Etheredge, and Tammy Etheredge, for which execution shall issue if necessary.

JEFFREY USMAN, JUDGE