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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF ESTATE OF FIZZINOGLIA,

Deceased.

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JOSEPHINE PARADISO FIZZINOGLIA,

Appellant,

-against-

FRANK FIZZINOGLIA, et al.,

No. 173  
(Papers Sealed)

Respondents.

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20 Eagle Street  
Albany, New York 12207  
October 21, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 173.

2 Counselor, were you like any rebuttal time?

3 MS. MILLER: Yes, I would. I'd like five  
4 minutes rebuttal, please. Can you hear me?

5 CHIEF JUDGE LIPPMAN: Five minutes, you  
6 have it. Go ahead.

7 MS. MILLER: Thank you very much. Your  
8 Honors, thank you very much for granting leave in  
9 this case. I have a very strong feeling that you did  
10 so not only to determine whether or not Josephine  
11 Fizzinoglia wa - - - was entitled to some rejudgment  
12 in the case below; I believe you probably want to  
13 consider whether or not the people of this state and  
14 the bar of this state really need guidance from you  
15 as to what is required to have a valid prenuptial  
16 post-nuptial agreement.

17 CHIEF JUDGE LIPPMAN: Counsel, what - - -  
18 what - - - what indicates from the record that this  
19 was an uneven situation when your client came in to  
20 sign the - - - the prenup? What - - - what here - -  
21 - what's the imbalance here in your mind?

22 MS. MILLER: There was a great deal of  
23 imbalance, Your Honor. First of all, my client, who  
24 was a police officer, was at work. She was called  
25 from work, come into the gasoline station - - - which

1 her husband was a half-owner with his father - - - we  
2 want some pap - - - papers for you to sign. So she  
3 came in; this was nine days before her wedding.

4 She came in to the little room outside the  
5 actual station, where there wasn't even room for her  
6 to sit down because there were three big men at a  
7 table and some chairs. And she stood there and she  
8 made little chit-chat, and then some - - - someone  
9 handed her - - - I believe it was Mr. DiAngelo (ph.)  
10 handed her some papers, and said, this is a prenup.  
11 Read it and sign it.

12 JUDGE STEIN: Well, could she - - - could  
13 she have asked for some time to - - - to take it home  
14 and read it or maybe - - - maybe even go to a lawyer?  
15 I mean, was there - - - is there anything in the  
16 record - - -

17 MS. MILLER: Judge, she - - - she didn't -  
18 - -

19 JUDGE STEIN: - - - to indicate that she  
20 couldn't do that?

21 MS. MILLER: - - - ask for that.

22 JUDGE STEIN: Why?

23 MS. MILLER: She didn't think of asking for  
24 that. This is a woman who really wasn't expecting  
25 this to happen. And - - - and was - - -

1                   JUDGE STEIN: Well, they had - - - they had  
2 talked about the - - - the prenup a little bit  
3 beforehand.

4                   MS. MILLER: Well, I think there's some  
5 evidence that it was mentioned. She didn't like the  
6 idea, but she didn't say I won't do it.

7                   CHIEF JUDGE LIPPMAN: Coun - - -

8                   JUDGE STEIN: We're not talking about a  
9 woman who's a stay-at-home mom, who wasn't worldly,  
10 didn't, you know, do things for herself, you know,  
11 any - - - she didn't have any mental disabilities or  
12 anything like that that would indicate that she  
13 wasn't capable of protecting herself in this  
14 situation.

15                   MS. MILLER: Your Honor, I think she wasn't  
16 thinking of protecting herself. She was thinking of  
17 getting married to a man she loved, a man she  
18 trusted, and a man she was going to spend her life  
19 with for better or for worse.

20                   JUDGE STEIN: So I guess the question is,  
21 is would it be true then in any situation where two  
22 people are talking about getting married, and there's  
23 some discussion of a prenup, and then nothing  
24 happens, nothing happens, and a week or two before  
25 the wedding, it's presented to - - - to the spouse,

1           then that in and of itself, those circumstances are  
2           enough to show some kind of inequality or duress or -  
3           - - or something of that nature?

4                   MS. MILLER:   Not necessarily.

5                   JUDGE STEIN:   Okay, so what - - - what - -  
6           - what makes this different?

7                   MS. MILLER:   Well, what makes this  
8           different is that this woman was presented with a  
9           document which in and of itself is so defective that  
10          just looking at the doc - - - at the document itself,  
11          as a matter of public policy and as a matter of  
12          common sense.  This document not only said there was  
13          disclosure and the purpose of it was to disclose the  
14          assets of the parties, but there was no disclosure.

15                  JUDGE RIVERA:  You're saying the document  
16          is inherently misleading.  The text itself - - -

17                  MS. MILLER:   It was ab - - -

18                  JUDGE RIVERA:  - - - was not representative  
19          of the - - - the - - - the meeting amongst the  
20          parties, and certainly not amongst her and her then-  
21          future husband.

22                  MS. MILLER:   Your Honor, it was more than  
23          misleading.  It was totally false.

24                  JUDGE FAHEY:  Well, are - - - aren't you  
25          really talking about the failure - - - there was an

1 exhibit not attached, Exhibit A, I believe - - -

2 MS. MILLER: It - - - partially - - -

3 JUDGE FAHEY: - - - which is a listing - - -

4 -

5 MS. MILLER: Partially the exhibit not  
6 attached.

7 JUDGE FAHEY: But let me just finish my - - -

8 -

9 MS. MILLER: Also it's - - -

10 JUDGE FAHEY: Let me - - - let me finish my  
11 point on that. The way I understood it, there was an  
12 exhibit not attached and when I read the record, I  
13 agree with you. It did pique my interest. I  
14 thought, well, someone signed a contract without an  
15 exhibit attached, all right.

16 But then when I looked at it, I - - - the  
17 more I looked into the case law, the case law seems  
18 to indicate that it's only required to be attached if  
19 there is some division of property or some - - - a  
20 splitting of property between the two of them - - -  
21 or a listing of the property to say this is yours and  
22 this is mine.

23 But instead, the agreement itself said  
24 whatever you have is yours, whatever I have is mine  
25 before the marriage. It's separate property. We

1 agree it to now. So you wouldn't need to have an  
2 exhibit attaching anything to there.

3 MS. MILLER: Well, Your Honor, if I can - -  
4 -

5 JUDGE FAHEY: Go ahead and address that,  
6 yeah.

7 MS. MILLER: If I can just explain?

8 JUDGE FAHEY: Yeah.

9 MS. MILLER: The agreement said the purpose  
10 of this agreement - - - the very purpose of this  
11 agreement - - - is for you to disclose all of your  
12 assets. That's number one. And the - - - and - - -  
13 and the assets were not disclosed.

14 CHIEF JUDGE LIPPMAN: Counsel, did she  
15 disclose her assets?

16 MS. MILLER: Nobody disclosed any assets.

17 CHIEF JUDGE LIPPMAN: So was she concerned  
18 about assets?

19 MS. MILLER: She was not concerned at all.  
20 She was - - -

21 CHIEF JUDGE LIPPMAN: Why is this a  
22 problem, then, that the - - - the attachment was not  
23 part of the agreement?

24 MS. MILLER: Well, the problem, Your Honor,  
25 goes beyond this particular par - - - party, number

1 one. Number two, not only were the assets not  
2 attached, the agreement said, these parties were  
3 represented by counsel. It stated that in the  
4 agreement. This is a lie. They were not represented  
5 by counsel. She had no counsel at all.

6 So this agreement, which is so defective,  
7 which states that there is disclosure - - -

8 CHIEF JUDGE LIPPMAN: Why - - - why did she  
9 not have counsel?

10 MS. MILLER: Because she didn't expect this  
11 to happen, Your Honor. She came there from her job.  
12 She came there nine days before her wedding, when her  
13 fiancé asked her to - - - to appear, and then she was  
14 given this agreement. And she was asked to read it  
15 and sign it.

16 CHIEF JUDGE LIPPMAN: Yeah, but that wasn't  
17 the first time she heard about a prenup.

18 MS. MILLER: Well, I think it was maybe the  
19 second. It was not - - - it was not part of their  
20 daily conversation.

21 JUDGE RIVERA: At - - - at what point did  
22 she know that that meeting was going to be to discuss  
23 the prenup? When she walked in the door?

24 MS. MILLER: I think when she walked in the  
25 door, this - - - the testimony was there was a little

1 chit-chat, and then she was given the agreement and  
2 said this is a prenup; sign it. And she flipped  
3 through the papers.

4 JUDGE ABDUS-SALAAM: Counsel, you said that  
5 the - - -

6 MS. MILLER: And she signed it, yeah.

7 JUDGE ABDUS-SALAAM: - - - the agreement  
8 itself says that each party is represented by  
9 counsel.

10 MS. MILLER: Yeah.

11 JUDGE ABDUS-SALAAM: The way I read it at  
12 paragraph 17 on page 70 of the record, it says that  
13 "each party acknowledges that he or she has had  
14 adequate opportunity to read and study this  
15 agreement, to consider it and to consult with  
16 attorneys selected by each party." So I - - - I  
17 don't see anything that actually says that each side  
18 was represented but that - - -

19 MS. MILLER: I believe the acknowledgement  
20 does, Your Honor. If I remember correctly, I don't  
21 have it in front of me, but - - -

22 JUDGE ABDUS-SALAAM: Yeah, I just - - -

23 MS. MILLER: - - - I believe the  
24 acknowledgement said the parties have. I - - - I - -  
25 -

1 JUDGE ABDUS-SALAAM: "And has been advised  
2 by independent legal counsel" - - -

3 MS. MILLER: Yes, have been advised.

4 JUDGE ABDUS-SALAAM: - - - "concerning the  
5 rights, liabilities" - - -

6 MS. MILLER: Have been advised, yes.

7 JUDGE ABDUS-SALAAM: - - - "and indications  
8 of this document."

9 MS. MILLER: And - - - and that is not  
10 true.

11 JUDGE ABDUS-SALAAM: So that  
12 acknowledgement is absolutely false is what you're  
13 saying.

14 MS. MILLER: Absolutely false. Absolutely  
15 false. So - - -

16 JUDGE FAHEY: You know, she was asked at  
17 her deposition about - - - about some of this stuff,  
18 and she was, like - - - whether or not anyone  
19 provided her information about Anthony's assets. She  
20 said it there "Those things don't matter". And then  
21 there's a quote from petitioner, and then she said,  
22 when asked if anyone had inquired her of Anthony's fi  
23 - - - about Anthony's finances before she signed the  
24 prenup, she said "No, it didn't matter, no."

25 MS. MILLER: Yeah, well, that - - - I think

1 this was exactly her point of view. She said, at  
2 that particular point, she was not thinking of what -  
3 - - of those things. As many people enter into these  
4 agreements, they do so with a feeling of trust and  
5 confidence, and because of the nature of these  
6 agreements, where - - - which, as we all know - - - I  
7 don't have to tell this bench - - - there are a lot  
8 different than commercial agreements.

9 They're entitled to a special scrutiny  
10 because they're dealing with people who are about to  
11 get married and spending their lives together. And  
12 this is why we have had so much litigation - - - I  
13 don't have to tell this bench - - - about this very  
14 question of - - -

15 CHIEF JUDGE LIPPMAN: Okay, counsel.

16 MS. MILLER: Yes.

17 JUDGE PIGOTT: We're going to - - - you're  
18 going to get your rebuttal. Let's hear from your  
19 adversary.

20 MR. LUSARDI: Thank you, Your Honors. The  
21 thing I want to indicate - - -

22 CHIEF JUDGE LIPPMAN: Counsel, what could  
23 be more intimidating or unfair, at least from the  
24 visceral appearance of it, to have this woman come  
25 in; regardless of how much had been talked about with

1 the prenuP, it wasn't much. She comes in, she's  
2 handed the document and says sign it. It indicates  
3 there are attachments; they're not there. What's  
4 fair about that?

5 MR. LUSARDI: Well, I don't - - - I don't  
6 know if it's fair or unfair, Your Honor. It is - - -

7 CHIEF JUDGE LIPPMAN: Well, that - - - that  
8 should be - - -

9 MR. LUSARDI: - - - it was her opportunity  
10 - - -

11 CHIEF JUDGE LIPPMAN: - - - what this is  
12 all about it, isn't it?

13 MR. LUSARDI: It was her opportun - - -  
14 well, first - - -

15 CHIEF JUDGE LIPPMAN: Is it fair and is  
16 there an imbalance that needs to be really addressed?

17 MR. LUSARDI: Well, let me - - - let me  
18 address that. The - - -

19 CHIEF JUDGE LIPPMAN: Please.

20 MR. LUSARDI: First of all, this woman was  
21 - - - is - - - is no shrinking violet. She is a - -  
22 - a very confident woman.

23 JUDGE FAHEY: But that's really - - -  
24 that's kind of irrelevant.

25 MR. LUSARDI: Okay.

1                   JUDGE FAHEY: The - - - the question is,  
2 she waived rights to property when she didn't even  
3 know what property she was waiving rights to, because  
4 it was never provided. How can that be fair?

5                   MR. LUSARDI: She had an opportunity, if  
6 she wished, to take the matter to an attorney.  
7 Nobody forced her - - -

8                   CHIEF JUDGE LIPPMAN: What about that day  
9 when she was there? Do you think she had a full  
10 opportunity to say, listen, I don't really want to  
11 sign this, I'm going to go and consult an attorney -  
12 - - standing up in the little room in the gas station  
13 with, you know, the three men who were there. Is - -  
14 - is that kind of the way these things should - - -  
15 should happen? Is that - - - is that the way a  
16 prenup should be signed between two people who are en  
17 - - - entering into matrimony?

18                   MR. LUSARDI: No, absolutely not, but  
19 understand - - -

20                   CHIEF JUDGE LIPPMAN: So why shouldn't we  
21 take a really good look at what went on here?

22                   MR. LUSARDI: Well, the parties were on an  
23 equal footing in this regard.

24                   CHIEF JUDGE LIPPMAN: Tell us how. How are  
25 they on an equal footing?

1 MR. LUSARDI: Well, first of all, the - - -  
2 the agreement was like a - - - the agreement was  
3 actually provided to Frank Fizzinoglia, the father of  
4 Anthony Fizzinoglia, as of - - - essentially as a  
5 form sent to him by an attorney up in Claverack, New  
6 York - - - actually, not by the attorney, but the  
7 attorney's secretary that sent him this form.

8 There was no attorney involved in this  
9 thing. There was no drafting of this agreement in  
10 the sense that there was a calculated effort or an  
11 intent on the part of Anthony Fizzinoglia to have an  
12 advantage with an attorney-drafted document - - -

13 JUDGE RIVERA: Yeah, but their side had the  
14 access to the lawyer. Their side is the one who's  
15 getting the document from the lawyer. They've gotten  
16 in advance. He could have read it. He could have  
17 sent it back to the lawyer. He could have crossed  
18 out things. She walks into a room, she sits down,  
19 they say here it is; sign it.

20 MR. LUSARDI: Correct. They - - - they  
21 didn't say sign it. There's - - - here's the  
22 document. Nobody directed her to sign it.

23 JUDGE RIVERA: Well, what do you think that  
24 - - - well, what do you - - - what would be the  
25 implication? Don't sign it?

1 MR. LUSARDI: Here's what - - - here's - -  
2 -

3 JUDGE RIVERA: Get up and walk out?

4 MR. LUSARDI: Yeah.

5 CHIEF JUDGE LIPPMAN: Did they - - - did  
6 they, when they - - - they - - - you're think their  
7 intention when they called her was to say, come in;  
8 we'll talk about it, you'll see, maybe you'll want to  
9 take it to a lawyer. It doesn't seem like that's  
10 what was going on. It's kind of a fait accompli  
11 optics here that seem to be going on, and - - - and  
12 we understand your arguments about why it's okay, but  
13 it's certainly - - - the aroma of it is not the way a  
14 - - - such an important document, you think, would be  
15 handled as a prelude to a marriage. I mean, really,  
16 not - - - not - - - it jumps out at you as being kind  
17 of - - - see, this is not the way these things should  
18 be done.

19 MR. LUSARDI: I - - - I understand. I  
20 mean, ideally, you'd have an attorney draft it, each  
21 side would have an attorney. There would be a, you  
22 know - - - a period for review of the document and so  
23 forth. I understand that.

24 CHIEF JUDGE LIPPMAN: I mean, you're  
25 summoned. You're summoned not to say, oh, so glad

1           you're here.  Let's - - - let - - - why don't you  
2           take a look at this, take it home.  The purpose here  
3           is summon, sign it.

4                       MR. LUSARDI:  Right.

5                       JUDGE STEIN:  Did she - - - did she - - -

6                       JUDGE RIVERA:  And - - - and it's not - - -  
7           it's not her with her fiancé.  There are other people  
8           in the room.  This is not the parties who were  
9           signing the agreement.

10                      MR. LUSARDI:  Correct.

11                      JUDGE RIVERA:  There were other people in  
12           the room who were not parties to the agreement.  What  
13           are they doing in the room?  They - - - they - - -  
14           their role has to be something other than acquiescing  
15           to the terms.

16                      MR. LUSARDI:  I understand, but - - - and I  
17           understand that we're limited to the record, but you  
18           have to also understand that Anthony Fizzinoglia is  
19           dead.  He cannot testify as to what else would have  
20           been said between him and - - - and his fiancé about  
21           this agreement or what was said to her about what was  
22           going to happen at that gas station.

23                      JUDGE STEIN:  Well - - - well, the  
24           accountant was there as a notary.  Somebody had to  
25           actually witness the signatures.  So - - - so that

1           certainly can be explained, and did - - - but did - -  
2           - I - - - I guess what's concerning me is that she -  
3           - - she doesn't allege that anybody said to her, you  
4           know, you've got to - - - you know, you have to sign  
5           this now or the wedding's off.

6                     You know, I - - - you know, I just - - - I  
7           - - - if she had said, you know, I really would like  
8           some - - - some time to do this and she was told no,  
9           you got to sign now, to me it would be - - - it would  
10          be a done deal. But I - - - you know, that's missing  
11          here for me.

12                    MR. LUSARDI: Well, I - - - there's also -  
13          - - that's also missing in the pleadings in this  
14          matter, and it was also missing in opening statements  
15          and so forth. But the - - - the way the counsel for  
16          Josephine Fizzinoglia approached this, at least as I  
17          see it, was, you know, just looking at procedural  
18          issues, and if you didn't follow certain procedural  
19          issues, you don't even need to look at pretty much  
20          anything else.

21                    The Greiff ca - - - case talks about the  
22          circumstances - - -

23                    CHIEF JUDGE LIPPMAN: Yeah, but this is  
24          more than procedural issues. This is the whole  
25          ambiance, the whole aroma of what's - - - what's

1 going on here.

2 MR. LUSARDI: Right, but it's not just  
3 ambiance. It's also substance. I - - - certainly,  
4 the case law - - -

5 CHIEF JUDGE LIPPMAN: But why, again - - -  
6 I come back to why is the substance of the way this  
7 was handled fair, balanced, wasn't - - - one person  
8 wasn't at a tremendous disadvantage, you know, that  
9 would kind of flip the burden over to you to show  
10 that there real - - - wasn't really a problem here?  
11 Why - - - why was it - - - why was it even or - - -  
12 or at least something that - - - that we shouldn't  
13 put a tremendous burden on you to explain?

14 MR. LUSARDI: Okay. Well, again, this was  
15 a sort of a LegalZoom type of a situation. I don't  
16 think you can say it was anything other than that.  
17 This was a form that was obtained. These people  
18 didn't know a hundred percent about what they were  
19 doing, but if they wouldn't attach - - -

20 CHIEF JUDGE LIPPMAN: It was a fall, and  
21 then it was handled clumsily, is all your - - -

22 MR. LUSARDI: Yeah, but - - - but - - -

23 CHIEF JUDGE LIPPMAN: - - - your point?

24 MR. LUSARDI: - - - but my client - - - my  
25 - - - my - - - not my client - - - my client is an

1 auto mechanic.

2 JUDGE RIVERA: If you're saying she could  
3 walk away, apropos to Judge Stein's point, you have  
4 someone there to notarize it; it means you expect it  
5 to be signed in that moment. You don't expect  
6 someone to walk away. That's my point about the  
7 other people who were in the room.

8 MR. LUSARDI: Right, but I don't see any  
9 testimony or any allegation that she was - - - that  
10 her will was overborne by that. She hasn't asserted  
11 that.

12 JUDGE FAHEY: Would you - - - would you  
13 agree that - - - you were making reference to Greiff  
14 - - - the case, Greiff?

15 MR. LUSARDI: Yes.

16 JUDGE FAHEY: And - - - and would you  
17 believe that the - - - or agree that the test that  
18 applies is a - - - as I understand it, the test they  
19 articulated there would - - - which is that there  
20 must be a particularized inequality shown from the  
21 circumstances of the event.

22 MR. LUSARDI: That's right. And that - - -

23 JUDGE FAHEY: And - - - and so your basic  
24 argument is then that there was no inequality in this  
25 event.

1 MR. LUSARDI: Well, it's - - - it states  
2 also in Greiff that the "nature of the relationship  
3 between the couple and at the time they executed the  
4 prenuptial agreement rose to the level to shift the  
5 burden." So you need to look - - - as I see Greiff,  
6 you need to look at the over - - - surrounding  
7 circumstances of the situation and that brings into  
8 the issue with the fairness of the agreement, her  
9 stated desire that everything be fifty-fifty.

10 Everything was split fifty-fifty before and  
11 during the marriage. They - - - they each paid half  
12 of the honeymoon. They paid it when they were living  
13 together.

14 JUDGE FAHEY: Yeah, but that doesn't go to  
15 your intestate rights.

16 MR. LUSARDI: And - - - well, she said - -  
17 -

18 JUDGE FAHEY: It's a long way from your  
19 intestate rights.

20 MR. LUSARDI: Her intent was - - - her  
21 intent in this whole thing was what was her - - -  
22 what was hers was hers, what was his was his. And -  
23 - -

24 JUDGE ABDUS-SALAAM: Is there any way - - -  
25 even though Exhibit A was blank, is there any way for

1 us to determine other than maybe her testimony about  
2 what she knew he had before they got married?

3 MR. LUSARDI: Sure. Absolutely. There's a  
4 very good - - -

5 JUDGE ABDUS-SALAAM: Is there anything  
6 different about what she knew and what actually the  
7 deceased was possessed of when he died?

8 MR. LUSARDI: Yes. The testimony was that  
9 she managed the finances of the couple when they were  
10 living together before the marriage. She knew about  
11 the fact that he was a partner with his father in the  
12 gas station. She knew that he had some bonds. She  
13 knew that he had jewelry and so forth. She knew he  
14 had cash. She knew all those things.

15 JUDGE ABDUS-SALAAM: She knew that it was  
16 300,000 dollars?

17 MR. LUSARDI: No, it wasn't 300,000.  
18 There's no evidence that that 320,000 dollars existed  
19 at the time of the prenuptial agreement. In fact,  
20 the testimony was it didn't. She never saw that kind  
21 of money. My - - - his father never saw that kind of  
22 money, and I think the circumstances were such that  
23 this money was generated after the marriage.

24 But also, Josephine Fizzinoglia was the  
25 administratrix of this estate for two years before

1 the trial. She had every opportunity to subpoena  
2 documents, to - - - to ask for documents, to - - - to  
3 conduct depositions. She's alive; Anthony's dead.  
4 He can't defend himself. She has the access to all  
5 this.

6 JUDGE PIGOTT: When - - - when is the first  
7 time the idea of a prenup was - - - was raised?

8 MR. LUSARDI: Ac - - - according to the  
9 testimony, the - - - the father obtained the form  
10 prenuptial agreement in February of 2005, gave it to  
11 his son immediately. The - - - it is not clear - - -  
12 the record does not indicate when Josephine actually  
13 received the prenuptial agreement from Anthony, but  
14 there is in the record testimony from the sisters  
15 that they had conversation with Josephine about the  
16 fact that there was a prenuptial agreement and she  
17 was taking it to an attorney and so forth.

18 That testimony didn't - - - didn't take  
19 place during the petitioner's direct case, but it's  
20 in the deposition transcripts attached to the summary  
21 judgment motion. So that I can't tell you  
22 specifically how long she had it, but there's - - -  
23 there is evidence that she had it for some period of  
24 time before the gas station - - -

25 JUDGE PIGOTT: The reason I ask is I got

1 the impression that this gas station was probably the  
2 father's, and he grew into it, and they became  
3 partners.

4 MR. LUSARDI: Correct.

5 JUDGE PIGOTT: And Dad was a little  
6 concerned that if there was trouble in the marriage,  
7 he - - - the dad - - - could lose his business.

8 MR. LUSARDI: That's right. And he's also,  
9 in a sense, a third-party beneficiary of this  
10 agreement, and the fact is that she never challenged  
11 it. She never cri - - - she never raised any  
12 criticism of the agreement, never challenged it in  
13 any legal proceeding. Even in the divorce with  
14 Anthony, it was not raised as an issue. She was  
15 ready to settle that divorce with a 22,000 dollar  
16 payment for her half-interest in the equity of the  
17 house, and keep all of her things and go.

18 And - - - and bear in mind, you know, she  
19 was actually in a superior financial situation to  
20 him. She had a twenty-year state pension. She had a  
21 - - - a - - - a security - - - I'm sorry; a - - - a -  
22 - - a deferred compensation plan. She had a legal  
23 services plan. She had health insurance. She had  
24 substantial sums of money of her own and she was  
25 making considerably more money than Anthony. She

1 derived a substantial benefit from this agreement.

2 It was more than fair to her. And - - - and

3 certainly then - - -

4 CHIEF JUDGE LIPPMAN: Why was it more than  
5 fair to her?

6 MR. LUSARDI: Because Anthony comes into  
7 this relationship with a half-interest in a gas  
8 station with a five year lease, which - - - which gas  
9 station ultimately went insolvent in - - - in a  
10 matter of a few years after the marriage.

11 She has a pension that's probably worth a  
12 million dollars, okay, and he waived his ERISA rights  
13 against that pension. She con - - - she was able to  
14 hold on to all of that pension. She was able to hold  
15 on to all of her money. If she was making  
16 substantially more money than him, she would have had  
17 - - -

18 JUDGE RIVERA: Is that - - - is that the  
19 standard we evaluate this by?

20 MR. LUSARDI: I'm sorry, I didn't - - -

21 JUDGE RIVERA: Is that the standard by  
22 which we evaluate this? Who really got the best  
23 deal?

24 MR. LUSARDI: I think it's a consideration.  
25 I do not think that you can divorce the procedural

1 unconscionability, if you will - - - that - - - that  
2 whole line of cases of procedural unconscionability  
3 and substantive unconscionability. I think you have  
4 to look at how the whole things came down. You have  
5 to look at the fairness of the agreement itself, and  
6 then the circumstances of the parties.

7 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's  
8 - - - let's hear rebuttal from your adversary.

9 Counselor?

10 MS. MILLER: Thank you, Your Honors. First  
11 of all - - -

12 CHIEF JUDGE LIPPMAN: What do you - - -  
13 your - - - your adversary seems to be as the - - -  
14 the heart of his argument that there was no imbalance  
15 here.

16 MS. MILLER: I'm glad you asked that.

17 CHIEF JUDGE LIPPMAN: That - - - that they  
18 each had their own assets. That she understood that,  
19 that - - - while the circumstances of the signing  
20 itself was clumsy, and he acknowledges that.  
21 Legally, what - - - what is the test? What makes  
22 this unfair?

23 MS. MILLER: Your Honor, the testimony is  
24 that - - - the father testified that he wanted - - -  
25 who's the respondent in this case - - - that he

1 wanted this prenup. What did he want it? Because -  
2 - - I'm quoting from the record - - - because he - -  
3 - his son - - - has assets and she has nothing.  
4 That's what his testimony is.

5 JUDGE ABDUS-SALAAM: Well, that - - - that  
6 just suggests that they were mistaken about what each  
7 other had, because if she - - - if - - - if she does  
8 have a - - - a pension and perhaps deferred  
9 compensation or other things, she has some assets.

10 MS. MILLER: I'm sure, but we don't know  
11 what assets he had. We don't know what he had.  
12 There was no disclosure in this case. We know that  
13 when he died, he had - - - probably drug money of  
14 340,000 dollars. But we don't know what he had at  
15 the time this agreement was executed.

16 Sure, she got the bank statements and she  
17 got the bonds, but she didn't know what else was  
18 going on.

19 JUDGE ABDUS-SALAAM: Well, has anything  
20 been uncovered?

21 MS. MILLER: When people get married they  
22 don't know - - - pardon?

23 JUDGE ABDUS-SALAAM: Has anything been  
24 uncovered since he died other than what we know about  
25 in the record?

1 MS. MILLER: I - - - there's nothing in the  
2 record to show. There's no - - - but I think it's  
3 most telling - - -

4 JUDGE RIVERA: But you're saying at the  
5 time of the agreement - - -

6 MS. MILLER: - - - that the reason for this  
7 prenup was that the father - - - his father, who got  
8 his lawyer to provide this - - - this agreement - - -

9 CHIEF JUDGE LIPPMAN: But it's conceivable  
10 that the father could feel that way and that the  
11 intended bride could think this is fine, I have  
12 plenty of my own stuff; I'd rather leave it like - -  
13 - in other words, because he had that view of it, how  
14 does that affect what her viewpoint of what she was  
15 getting into was all about?

16 MS. MILLER: Your Honor, I don't think she  
17 was thinking about the money. I do know one thing  
18 that was clear in the testimony. She did not  
19 understand what a waiver of estate rights is. She  
20 did not know anything about that in her testimony.  
21 So - - -

22 CHIEF JUDGE LIPPMAN: And why - - - and why  
23 wouldn't she have - - - given that, why wouldn't she  
24 have consulted a lawyer?

25 MS. MILLER: Well, I think maybe I - - -

1 and this is just surmise - - -

2 CHIEF JUDGE LIPPMAN: You think she was  
3 buffaloed into signing it? Is that - - -

4 MS. MILLER: I think if she thought that  
5 this man she was about to marry was asking her to  
6 waive all her rights in his estate if they lived  
7 together for fifty years - - -

8 JUDGE STEIN: But they - - - they actually  
9 only were married for four, right?

10 MS. MILLER: That's right.

11 JUDGE STEIN: Okay.

12 MS. MILLER: Because she left when he was  
13 having an affair with a neighbor. That's how the  
14 marriage broke.

15 JUDGE PIGOTT: What did - - -

16 JUDGE RIVERA: He said she's never  
17 challenged the agreement.

18 MS. MILLER: What?

19 JUDGE RIVERA: He says she's never  
20 challenged the agreement, if she's so dissatisfied  
21 with it - - -

22 MS. MILLER: She never thought about the -  
23 - -

24 JUDGE RIVERA: - - - or felt there was  
25 inequality - - -

1 MS. MILLER: She never thought about the  
2 agreement at that time. I think when she signed the  
3 agreement, that was the end of it.

4 JUDGE RIVERA: Even during the divorce, he  
5 says.

6 JUDGE STEIN: What about during the  
7 divorce?

8 JUDGE RIVERA: During the divorce, she  
9 didn't challenge it.

10 MS. MILLER: I - - - I have no idea what  
11 happened during the divorce. All I do know is that  
12 she did not have an attorney. The attorney she had  
13 for the divor - - -

14 JUDGE RIVERA: I guess he didn't challenge  
15 it either, so.

16 MS. MILLER: Pardon?

17 JUDGE RIVERA: He didn't challenge it  
18 either.

19 CHIEF JUDGE LIPPMAN: Counsel, what's the  
20 importance of this case to the bigger picture of  
21 these kinds of prenups? What's the point you're  
22 trying to make?

23 MS. MILLER: I'm so - - -

24 CHIEF JUDGE LIPPMAN: How it affects this  
25 particular case and the bigger issues about prenups?

1 MS. MILLER: I am so happy you asked me  
2 that, Your Honor, because this is an important case.  
3 Important, not just - - -

4 CHIEF JUDGE LIPPMAN: Why?

5 MS. MILLER: - - - not just for Josephine,  
6 but because there are people throughout this state  
7 and attorneys throughout this state, and - - - and  
8 decisions throughout this state which are in conflict  
9 about what is in - - - what you must do to - - - to  
10 prepare and execute - - -

11 CHIEF JUDGE LIPPMAN: So what's the rule?  
12 What's the rule if you would - - -

13 MS. MILLER: The rule now?

14 CHIEF JUDGE LIPPMAN: That you would make,  
15 that you would want us, in deciding this case - - -  
16 what's the rule and how does it affect all the other,  
17 you know - - - we have a case in front of us, but how  
18 does it affect all the other cases?

19 MS. MILLER: I would urge that this court  
20 establish a rule that in all such cases of prenuptial  
21 or post-nuptial agreements, there must be disclosure.  
22 That rule is a rule that has been enact - - - ruled  
23 in, I think, twenty-seven different states in this  
24 country.

25 CHIEF JUDGE LIPPMAN: So you can't have a

1 prenup unless there's full disclosure of assets?

2 That's the rule that you would like?

3 MS. MILLER: Yes, unless there is a waiver  
4 that is made voluntarily and knowingly, and that  
5 waiver should be made with advice of counsel.

6 CHIEF JUDGE LIPPMAN: So in this particular  
7 agreement, it did say, I understand A, B, C and D.  
8 How do we know that that wasn't a knowing waiver?

9 MS. MILLER: I would say that would be a  
10 question of fact. But it would seem to me - - -

11 JUDGE RIVERA: I thought it depended on  
12 advice of counsel. Are you saying you don't need  
13 advice of counsel?

14 MS. MILLER: It should be with advice of  
15 counsel. I believe that - - - and because today  
16 people will get these agreements on the Internet.  
17 They will get them and they will have them executed  
18 as - - - as - - -

19 CHIEF JUDGE LIPPMAN: Does it matter that  
20 this was a form prenup?

21 MS. MILLER: I don't think it matters that  
22 it was a form pre - - - prenup. I think it matters  
23 that there was no advice of counsel. And I think it  
24 matters - - - I know it matters - - - that there was  
25 no disclosure.

1 JUDGE ABDUS-SALAAM: Well, does it matter  
2 that either side had a lawyer or didn't have a  
3 lawyer?

4 MS. MILLER: I believe both sides should  
5 have a lawyer. And this is - - -

6 JUDGE ABDUS-SALAAM: In this case, though -  
7 - -

8 MS. MILLER: In this particular case - - -

9 JUDGE ABDUS-SALAAM: - - - it doesn't  
10 appear that either side had a lawyer.

11 MS. MILLER: Well, in this particular case,  
12 she clearly didn't have a lawyer. He had his - - -  
13 the accountant for his firm and he had his father's  
14 lawyer who - - - his father's lawyer had prepared it  
15 and his father was there, so - - - though he didn't  
16 actually have counsel, he had advice.

17 JUDGE ABDUS-SALAAM: It sounds like it  
18 wasn't fully prepared. It was some kind of form.  
19 That's what I'm getting at.

20 MS. MILLER: Pardon?

21 JUDGE ABDUS-SALAAM: It sounds like it was  
22 some sort of form that was not really prepared by an  
23 attorney.

24 MS. MILLER: Yeah, well, it was provided by  
25 him, not prepared by him.

1 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank  
2 you both.

3 MS. MILLER: Thank you.

4 CHIEF JUDGE LIPPMAN: Appreciate it.

5 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Estate of Fizzinoglia, No. 173, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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