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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-202 / 89-683

IN THE MATTER OF THE ESTATE OF O. D. BUSH, Deceased, JEFFREY D. BUSH and PAULA FEHRING, Administrators.

M. HELEN BUSH,

Appellee,

vs.

JEFFREY D. BUSH and **PAULA FEHRING,** As Administrators of the Estate of O. D. BUSH, and Individually,

Appellants.

Appeal from the Iowa District Court for Taylor County, Jerrold W. Jordan, Judge.

The administrators appeal from a district court judgment determining that the prenuptial agreement between O. D. Bush and Helen Bush was unenforceable and awarding Helen her intestate share of O. D.'s estate. **REVERSED.**

Emil Trott, Jr. of Barrett & Trott, Des Moines, for appellants.

Ralph R. Brown of McDonald, Brown & Kimple, Dallas Center, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ., but decided en banc.

HABHAB, J. 71

The sole issue presented in this appeal is whether the district court erred in finding an antenuptial agreement between appellee M. Helen Bush and decedent O. D. Bush to be void. We reverse.

On July 8, 1978, O. D., age sixty-three, and Helen, age fifty-eight, were married. On the day before their marriage, O. D. and Helen executed an antenuptial agreement, which had been prepared by O. D.'s attorney. This agreement, in essential part, provided that all real estate and personal property owned by the respective parties at the time of their marriage would retain its status as that person's sole property. The antenuptial agreement further provided each party was to execute a will after their marriage in conformity with the agreement.

O. D. died intestate on February 28, 1988. Helen had not executed a will by that date. Based on the antenuptial agreement, the administrators of O. D.'s estate refused to confer to Helen the share of the surviving spouse provided for in Iowa Code section 633.212.

Helen subsequently filed an application with the district court seeking her section 633.212 share of O. D.'s estate. The district court found the antenuptial agreement to be unenforceable. Appellants, administrators of O. D.'s estate, have appealed from that decision.

Our review here is de novo. Iowa R. App. P. 4. We give weight to the district court's findings of fact, but are not bound by them. Iowa R. App. P. 14(f)(7).

Antenuptial contracts are favorably looked upon by the law and are to be liberally construed in order to carry out the intentions of the parties. In re Marriage of Pillard, 448 N.W.2d 714, 715 (Iowa App. 1988); In re Parish's Estate, 236 Iowa 822, 830, 20 N.W.2d 32, 36 (1945). The purpose of antenuptial agreements is to establish the interests of the respective parties in the property of the other. Pillard, 448 N.W.2d at 715; Parish, 236 Iowa at 830, 20 N.W.2d at 36. Since such contracts differ in no way from normal contracts, we consider and construe them the same as other contracts. Pillard, 448 N.W.2d at 715. As the Iowa Supreme Court noted in Parish:

> If an antenuptial contract is not unfair, inequitable, or unconscionable on its face, and there has been no fraud or overreaching or deceit practiced in its being obtained, it should stand. This question is to be determined from the contract and any facts and circumstances in evidence. In such a case the burden is on the party claiming the invalidity of the contract. When an antenuptial contract is apparently unjust and unreasonable, the burden of proof is cast upon those claiming under the husband to show that the contract was fairly procured.

236 Iowa at 831, 20 N.W.2d at 36 (citations omitted). Upon our review of the record, we conclude Helen failed to meet her burden of proof on the issue of the antenuptial contract's invalidity.

O. D.'s attorney, Richard Wilson, testified that on July 5, 1978, O. D. and Helen came to his office so he could prepare an antenuptial contract for them. He further testified that it was his usual procedure concerning

antenuptial agreements to go through a checklist in order to gain the necessary information and to inform the parties of the effects of a antenuptial agreement. Wilson stated he had such a checklist for the Bush antenuptial agreement, and his records also reflected that he had spent three-quarters of an hour conferring with O. D. and Helen. Wilson further declared he had independent recollection of Helen being in his office on July 5th. In response to Helen's testimony she was not present at Wilson's office on July 5th and had never met Wilson, Wilson avowed he had never prepared an antenuptial agreement where both parties were not present.

The antenuptial agreement's specificity and the subsequent actions of O. D. and Helen lend credence to the proposition that Helen was present on July 5th and knew the effects of the agreement. Certain declarations embodied in the introduction to the antenuptial agreement are particularly relevant. First, the parties each owned real and personal property, and had fully informed the other of their respective financial situations. Second, both parties waived their respective dower or curtesy rights, and any statutory rights to the property of the other. Third, O. D.'s ownership of a quarter section of land and his contract to purchase residential property in Lenox are specifically described, and it was expressly understood and agreed the ownership of the two parcels of land was to be free and clear of any claim of the other party. Fourth,

the parties believed it was in the best interests of their respective children that each keep as his or her separate property that property owned individually, and that each party had the full power and right to dispose of his or her individual property at the time of death. Finally, the parties were fully advised of their legal rights[1] which would exist after their marriage in the absence of the agreement, and in consideration of the marriage the parties agreed to the terms of the agreement.

The particularly relevant terms of the body of the agreement included a provision which provided that as to the separate real estate described in the agreement, personal property owned at the time of the marriage, and after-acquired property, each party disclaimed and released any right, title, or interest in any estate which he or she might acquire by reason of the marriage or having been the spouse of the other.

At the time of their marriage, Helen was divorced and O. D. was a widower. Helen had five children by her previous marriage. O. D. had two children by his previous marriage.

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1. There may be instances when the parties to an antenuptial agreement may have potentially different interests. We do not say such circumstance exists here for that issue is not before us. Canon EC 5-15 of the Iowa Code of Professional Responsibility recognizes instances when a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation, and Canon EC 5-16 explains the procedure that is to be followed under those circumstances.

75

Helen testified at trial that on Friday, July 7, 1978, a day before their marriage, O. D. asked her to sign the prenuptial agreement. She further testified that O. D. told her that he had some papers pertaining to his farm and someone had suggested that he have her sign them before their marriage. According to Helen, she examined the papers and saw that they were a prenuptial agreement which provided wills were to be made after they were married. Helen admitted she read the agreement and signed it. She acknowledged to a notary that she had voluntarily signed the agreement.

She also testified it was her understanding that the prenuptial agreement was to be signed prior to their marriage and was in contemplation and consideration of the marriage. Further, she testified that at the time of signing she understood that O. D. was to retain his property prior to marriage and that she was to retain her property prior to marriage. She also understood that they were to retain their separate property acquired after marriage.

Following their marriage, O. D. and Helen maintained separate checking accounts and never wrote checks on the

other person's account.[2] Both O. D. and Helen disposed of their assets as they saw fit. It is clear that Helen at all times had her copy of the antenuptial agreement. Factually, it appears that Helen had her copy with her at the time she met with O. D.'s children at the office of the attorney for the estate.

The terms of the contract, on its face, are not unfair, inequitable, or unconscionable. Each respective party was to retain the rights to their real and personal property.

Finally, we consider Helen's argument that the parties' failure to execute wills as provided for in the agreement invalidated the antenuptial contract. It is undisputed that neither party executed a will as called for in their agreement. The will provision, however, added no substance to the agreement. The breach of this provision was not so substantial as to defeat the object of the parties. As such, rescission is not permitted. See Nora Springs Co-op Co. v. Brandau, 247 N.W.2d 744, 749 (Iowa 1976). Additionally, since both parties were in default as to this provision, neither person could seek relief by way of rescission based on it. See Folkers v. Southwest Leasing,

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2. The record is unclear if Helen placed her funds into a joint checking account or if O. D. merely had signed a signature card for Helen's account. In any event, the record does disclose that O. D. never wrote checks on the account.

431 N.W.2d 177, 182 (Iowa App. 1988). We find the antenuptial agreement to be a valid and binding contract.

REVERSED.

All judges concur, except Schlegel and Sackett, JJ., who dissent.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

I am well aware of the favor with which the Iowa courts view prenuptial agreements. They are, when made within the requirements set by law, favored by public policy. Matter of Estate of Ascherl, 445 N.W.2d 39 (Iowa App. 1989). We uphold them if they are fair between the parties and fairly, freely and understandingly entered into, by persons legally competent to contract. Id.

In this instance, the contract was only partly carried out. The intention of the parties was, for a reason not totally clear, not carried out. There is evidence that the understanding of the wife as to the holdings of the husband was not at all clear. In other words, there was not a knowing relinquishment by the wife of her rights to a part of his property. In addition, the promised provision by will was not made.

I would hold that the agreement in this case was unenforceable, since either it was not freely and understandingly entered into, or that it was not carried out by the execution of the wills required by it.

I would affirm the trial court.

Sackett, J., joins the dissent.

SACKETT, J. (dissenting)

I join Judge Schlegel's dissent. However, I am also concerned that the majority's decision relies heavily in reaching its conclusion on the language drafted by and the advice given to Helen by the decedent's lawyer, who apparently surmised he could represent both parties, and did not advise Helen to have independent legal representation.

The majority fails to recognize that parties to an antenuptial agreement have conflicting interests and should have separate legal representation. Helen did not have independent representation. Helen in signing the premarital contract gave up substantial rights, therefore she and decedent had conflicting interests and she should have been advised to seek separate and independent legal representation. I consider that fact in addressing her argument that she had not understood the agreement she was signing.