FILED
OCT 27 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MELVIN E. DREIER AND RUTH M. DREIER

Upon the Petition of)
MELVIN E. DREIER,)
Petitioner-Appellee,)
And Concerning)
RUTH M. DREIER,)
Respondent-Appellant.)

Filed October 27, 1981

1-175
2-64744

Appeal from Franklin District Court - B. C. Sullivan, Judge.

Respondent appeals from economic provisions of trial court decree dissolving her twelve year marriage to petitioner. AFFIRMED AS MODIFIED.

James E. Coonley, II, of Coonley & Coonley, Hampton, Iowa, for respondent-appellant.

Raymond P. Drew, Hampton, Iowa, for petitioner-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Respondent Ruth M. Dreier appeals from economic provisions of trial court decree dissolving her twelve year marriage to petitioner, Melvin E. Dreier. She contends that an antenuptial agreement executed by the parties prior to their marriage was not properly established and should not have been considered. She also contends that the economic provisions made for her in the decree were inadequate even if effect is given to the antenuptial agreement. She seeks attorney fees on appeal. Melvin cross-appeals contending that the economic award to the wife should have been in the form of periodic alimony rather than in the form of a lump sum payment. We affirm trial court's decree as modified.

The parties were married in 1968. Each had been married before, and each has adult children from the prior marriage. No children were born to this marriage.

At the time of trial, Ruth was 57 years old and Melvin was 55 years old. Before the marriage Melvin owned 367 acres of farm land and various other property. Ruth brought to the marriage about $3,000, a car, and some furniture.

The trial court found Melvin's net worth at the time of trial to be approximately $695,000. Melvin argues on appeal that his net worth is somewhat less than this sum butconcedes that it is in the range of $500,000.

Prior to the marriage the parties signed an antenuptial agreement. This antenuptial agreement was drafted by Melvin's lawyer and signed in that lawyer's office. Ruth did not consult separate counsel prior to executing the agreement. Ruth admitted in her trial testimony that she signed an antenuptial agreement. Apparently on appeal she is suggesting that the antenuptial agreement which she signed might not have comported with the copy which was introduced into evidence at the trial. There was evidence at the trial that a signed copy of the agreement could not be located and Melvin therefore purported to offer a copy as evidence of the agreement. Among the provisions contained in the written agreement evidenced by this unsigned copy was the following: "In the event the contemplated marriage shall end in divorce, the same provision[1] shall apply and neither will make any claim to any property of the other."

The trial court found and concluded that the existence and terms of the antenuptial agreement had been adequately established and that the agreement was

---

[1] This reference back relates to the prior provisions of the agreement that in the event of the death of either party, the survivor should make no claim to the property of the other.

enforceable except to the extent it purported to protect Melvin from any obligation to support Ruth in the event of a dissolution. The trial court gave effect to the agreement to the extent of holding that Ruth had no further rights to Melvin's property other than a right to support. The trial court effectuated Ruth's right to support by awarding her lump sum alimony of $50,000. Although this award was in the form of a lump sum, the trial court stated that the award was not intended to be a division of property but rather was intended to fullfill Ruth's need for support.

I. On Ruth's appeal she first asserts that the evidence was insufficient to establish the execution and terms of the antenuptial agreement. Our review as to this claim and other factual matters is **de novo.** Iowa R. App. P. 4. Ruth first contends that proof of the agreement is precluded by virtue of section 622.32(1), The Code, which applies the statute of frauds to contracts "made in consideration of marriage." We fail to find where this claim was raised in the trial court and are doubtful that it should be given consideration on appeal for this reason. We need not base our decision on such a restrictive basis, however, because there are other reasons this claim has no merit.

The first of these reasons is our belief that the requirements of a signed writing contained in the statute of frauds do not preclude proof of the existence of the signed writing by secondary evidence otherwise admissible to establish a lost instrument. See, e.g., Griebel v. Griebel, 242 Iowa 1229, 1233-34, 50 N.W.2d 15, 18 (1951); Hach v. Anderson, 240 Iowa 792, 795-96, 38 N.W.2d 94, 96 (1949); Fisher & Ball v. Carter, 178 Iowa 636, 641, 160 N.W. 15, 17 (1916). Secondly, in the present case a significant portion of the proof of the agreement came through the testimony of Ruth herself, thus bringing the matter outside of the statute of frauds by reason of section 622.35, The Code.

Our **de novo** review of the evidence leaves no room for doubt that the written copy of the antenuptial agreement relied upon by Melvin was the agreement executed by the parties prior to the marriage. The terms of that agreement directly affect the issue of property division in the present case.[2] Ruth's contention on appeal that she was "unduly influenced" by Melvin to enter into this agreement was not raised in the trial court and

---

[2] In this regard we also reject Ruth's contention that Melvin's amendment to his pleading specifically asserting the antenuptial agreement was so untimely as to preclude consideration thereof.

must be rejected for this reason. We add, however, that we are satisfied from our review of the record that such contention is without merit.

II. We next consider Ruth's claim that assuming the existence and validity of the antenuptial agreement, the trial court nonetheless erred in limiting Ruth's award as a result thereof. We find no indication that the trial court failed to recognize and apply the proper law concerning enforcement of antenuptial agreements. In re Marriage of Winegard, 278 N.W.2d 505, 512 (Iowa 1979), supports the trial court's conclusion in this case that the agreement is presumptively valid as to division of property and should be enforced except as it negates the obligation of spousal support. See also In re Marriage of Gudenkauf, 204 N.W.2d 586, 587-88 (Iowa 1973); Norris v. Norris, 174 N.W.2d 368, 369-70 (Iowa 1970). Here, the trial court provided for Ruth's support through an award of a lump sum of $50,000 given in lieu of alimony. However, Ruth claims that this sum is inadequate to provide such support as she requires. We agree. We believe that the award was inequitable given the length of the marriage and the other economic factors in the present record which bear upon the conditions specified in Schantz v. Schantz, 163 N.W.2d 398, 406 (Iowa 1968) (not considering fault). In light of these factors, we conclude that trial court's decree should be modified to award Ruth $75,000 in lieu of alimony. In so doing, we reject Melvin's claim on cross-appeal that the award is excessive or should be made payable in installments.

Trial court's decree is affirmed in all other respects. Costs on appeal shall be divided equally between the parties and each shall pay his or her own attorney's fees.

AFFIRMED AS MODIFIED.

All judges concur except Carter, J., and Donielson, J., who dissent.

CARTER, J. (dissenting)

I agree with the decision of the majority of the court to the extent that it adopts the trial court's method for protecting respondent's right of support through a lump sum award in lieu of alimony. I do not agree, however, with the determination on appeal that the size of the trial court's award was inadequate or inequitable. I would affirm the decree of the trial court.

Donielson, J., joins in this dissent.