IN THE COURT OF APPEALS OF IOWA

No. 0-777 / 99-1686
Filed April 27, 2001

IN RE THE MARRIAGE OF HELEN IRENE ROSSELL AND SIDNEY LEE ROSSELL

Upon the Petition of
HELEN IRENE ROSSELL,
Petitioner-Appellee/Cross-Appellant,

And Concerning
SIDNEY LEE ROSSELL,
Respondent-Appellant/Cross-Appellee.

FILED
APR 27 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Cass County, James M. Richardson (partial decree) and J.C. Irvin (final decree), Judges.

The respondent appeals, and petitioner cross-appeals, from various economic provisions of the parties' dissolution decree. Respondent contends: (1) the district court erred in awarding the petitioner monthly alimony of $2000; and (2) the district court's award of attorney fees was excessive. On cross-appeal, petitioner contends the district court erred in ruling that the prenuptial agreement between the parties was valid and enforceable. Both parties request an award of appellate attorney fees. **AFFIRMED AS MODIFIED.**

Terrance G. Rutherford and John M. Trewet of Rutherford & Trewet, Atlantic, for appellant.

J.C. Salvo and Richard C. Schenck of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

SACKETT, C.J.

Respondent-Appellant Sidney Lee Rossell appeals the district court's order awarding his ex-wife, Helen Rossell, permanent alimony of $2000 per month as well as a $4000 contribution toward her attorney fees. Petitioner-Appellee-Cross Appellant responds that the award of $2000/month and the $4000 attorney fees contribution was equitable, but claims on cross appeal that the prenuptial agreement was invalid and that the property distribution based on that agreement was therefore erroneous. We affirm as modified.

Sidney Lee Rossell and Helen Rossell, both of whom had been previously married, married each other in August of 1984. Dissolution proceedings, initiated by Helen, began fourteen years later, in October of 1998. Just before marrying in 1984, Sidney and Helen signed a prenuptial agreement. Under this contract each agreed, among other things, to waive any claim to the other's separately-owned property, whether this property was owned at the time of marriage or acquired during the marriage, as well as any claim for spousal support or alimony in the event of divorce. At the time of the agreement Sidney's assets were valued at almost $1.2 million. Helen's assets totaled just over $28,000. She was about to sell her home, which accounted for the bulk of her assets ($23,000), in order to live with Sidney at his house. Although she was advised to do so, Helen did not seek advice of counsel before signing the prenuptial agreement. In the first part of this bifurcated proceeding the district court ruled the prenuptial agreement was valid and enforceable.

In dissolving the marriage the district court apportioned jointly-owned property. In doing so it concluded Helen was not a joint owner in a leased Harvestore system but that she did have joint ownership in the 1997 Ford Explorer, worth an unencumbered $17,500. The court awarded her this Ford Explorer. The district court also ordered Sidney to pay Helen $2000 per month in permanent alimony as well as $4000 toward her attorney fees.

Before addressing the effect of a prenuptial agreement on a determination of alimony, we first address the Helen's claim that, contrary to the district court's conclusion, the prenuptial agreement in this case was a product of fraud and misrepresentation and is therefore unenforceable. A prenuptial agreement is invalid if it is signed unknowingly or involuntarily, or if it is entered into as a result of fraud, duress, or undue influence. *See In re Marriage of Spiegel,* 553 N.W.2d 309; 317 (Iowa 1996). Our standard of review of this equitable action is de novo. Iowa R.App. P. 4. *In re Marriage of Gonzalez,* 561 N.W.2d 94, 96 (Iowa Ct. App. 1997). We are not bound by the district court's findings of fact, but we do give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *Gonzalez* 561 N.W.2d at 96, *In re Marriage of Brown,* 487 N.W.2d 331, 332 (Iowa 1992).

We agree with the district court that the prenuptial agreement is enforceable. To determine the validity of the agreement, the district court heard the testimony of Sidney, Helen, and Jim Wells, the attorney who drew up the agreement. At the time Helen signed the agreement, she was not represented by a lawyer. She now claims she did not understand the provisions of the

agreement before she signed it. There is conflicting testimony as to whether Helen was aware of all of the provisions of the prenuptial agreement, specifically that provision denying her joint ownership in property accumulated in Sidney's name over the course of the marriage. The district court found that Mr. Wells went over in detail the contents of the prenuptial agreement at least twice.

Further, in spite of Jim Wells' advising Helen to seek representation by her own separate attorney, she did not seek counsel because she "trusted" Sidney and did not feel she needed one.[1] Helen had previously been divorced. She would have realized the potential consequences of the differing interests of a husband and wife, and how time might change one's charitable inclinations toward the other. Also Helen was aware that Sidney did not necessarily have a future intention to make substantial financial provision for her: Helen testified that he had told her he wanted his property to remain in his family, he had said he would leave her only $500/month in his estate, and his initial prenuptial agreement included a provision requiring Helen's children to fund her burial (a provision she protested and demanded removed from the agreement). Helen's failure to seek her own legal counsel and to investigate the terms of the agreement cannot be attributed to lack of knowledge, or to fraud or misrepresentation. Giving the required deference to the findings of the trial court

[1] Helen also claimed that she did not have the money for a lawyer. Although we take note that her list of assets shows she had only $550 at her disposal, we are not convinced that she was a victim of her own financial hardship rather than her own naiveté. Considering Sidney's eagerness to have a prenuptial agreement and his willingness to provide for her prior to the date of the agreement, we believe that Helen was not prevented from legal representation because she could not afford it.

regarding the credibility of the witnesses, we decline to invalidate the prenuptial agreement on grounds that it was unfairly entered into or fraudulent.

Having agreed with the district court that the prenuptial agreement was enforceable, we agree with its decision regarding property distribution according to the terms of the agreement. Although Helen may have been a co-obligor on the lease for the Harvestore system, she was not co-owner, and trial testimony indicates that she could have used farm funds to pay for the lease if she were ever to become personally liable for it. Under the agreement all independently owned property was to remain with its owner. The Harvestore system was part of real estate independently owned by Sidney. We therefore decline to give Helen any interest in the Harvestore system.

With respect to all property not jointly owned, we follow the prenuptial agreement, as did the trial court, and find each party should be awarded the property, both real and personal, tangible and intangible, held or titled in his or her respective names as of the date of trial.

We next turn to Sidney's claim that the alimony award of $2000/month was inequitable. Sidney argues that the prenuptial agreement waiving spousal support is binding with respect to alimony. He argues that the agreement was entered into during the brief span of time that such agreements were legally recognized, and that an award of alimony in a case in which a valid waiver of alimony has been executed is an unconstitutional deprivation of his due process rights.

Sidney failed to raise his constitutional due process claim in the district court. This argument, therefore, was not preserved for consideration on appeal, and we do not address it. *In the Interest of C.D.,* 508 N.W.2d 97 (Iowa 1993); *Thiele v. Whittenbaugh,* 291 N.W.2d 324 (Iowa 1980).

We do address the validity of the waiver itself. In *Vande Kop v. McGill,* 528 N.W.2d 609, 613 (Iowa 1995), the Supreme Court noted that prior to 1980, alimony waivers were considered void as against public policy, but this common-law rule was modified when an amendment to Iowa Code section 598.21 allowed courts to consider these waivers. *In re Marriage of Spiegel,* 553 N.W.2d 309, 319 (Iowa 1996). In 1992, as a part of the uniform premarital agreement act, Iowa Code section 596.5(2) was adopted, reestablishing the prior rule prohibiting these provisions. 1991 Iowa Acts ch. 77 § 5, *Id.* Following the Iowa Supreme Court, we have ruled before that, although alimony waiver provisions in prenuptial agreements executed between 1980 and 1992 may not be invalid, they are not dispositive with respect to the issue of alimony. Recognition of a waiver provision falling between 1980 and 1992 does not mandate, but merely makes permissible, consideration of a waiver provision in prenuptial contracts. *Spiegel,* 553 N.W.2d at 319.

The plain language of the statute the appellant relies on in construing the provision as valid supports this interpretation that, between 1980 and 1992, alimony waivers are merely permissible considerations in the determination of alimony:

> The court *may grant* an order requiring support payments to either party . . . after considering all of the following: . . .

i.) The provisions of an antenuptial agreement.

Neither the plain language of section 598.21(3) nor the case law interpreting it supports Sidney's contention that the provisions of a valid alimony waiver are determinative when deciding whether alimony can be awarded in a particular case.

Alimony is not an absolute right, and an award thereof depends upon the circumstances of a particular case. *Spiegel,* 553 N.W.2d 309. When making or denying an alimony award, the trial court considers the factors set forth in Iowa Code section 598.21(3). Although our review of the trial court's award is de novo, we accord the trial court considerable latitude in making this determination and will disturb the ruling only when there has been a failure to do equity. *Spiegel,* 553 N.W.2d at 319, *In re Marriage of Benson,* 545 N.W.2d 252, 257 (Iowa 1996).

In assessing the equity of the district court's award we give consideration to all of the factors listed in section 598.21(3). *In re Marriage of Friedman,* 466 N.W.2d 689, 693 (Iowa 1991). In awarding Helen alimony the district court focused on her modest earnings at Hy-Vee and, given her age, her physical infirmities, and educational level, the unlikelihood that Helen would undergo any substantial change in earning capacity. We agree with the trial court that these are proper factors to consider. Helen should earn $16,500 in wages annually. Helen is leaving the marriage with more assets than she entered with. While Sidney contends the alimony award is excessive, Helen argues that her investment in the marriage, in the form of cooking, keeping house, doing chores,

and generally minding the domestic side of the farm operation should be given substantial weight in assessing her right to alimony. She cites *Spiegel, In re Marriage of Geil,* 509 N.W.2d 738, 742 (Iowa 1993), and *In re Marriage of Steele,* 502 N.W.2d 18 (Iowa Ct. App. 1993), as authority for this proposition. In these cases the Supreme Court awarded alimony to wives who had remained unemployed (or under-employed) in order to care for the family and support the efforts of their husbands. In these cases the joint efforts of a husband and wife to achieve the common goal of maintaining a family unit had generated funds which both husband and wife, working together, were entitled to share.

We agree that the district court properly gave consideration to Helen's contribution to the farm operation. We note too that a substantial portion of the income the couple realized was a result not of their joint efforts but instead of income that was the result of the ownership of assets Sidney owned at the time of their marriage, assets Helen had agreed would remain Sidney's. The prenuptial contract expressly stated that currently-held properties, the income generated by those properties, and property separately acquired during the marriage were to remain separately owned. Sidney has made no claim to the assets Helen generated through her Hy-Vee job.

Helen further claims that the marriage disadvantaged her because, had she stayed with the job she held before marriage, she would have a better retirement package than the modest 401(k) plan she now has with Hy-Vee. Before marrying Sidney, Helen had about $550 in savings. She was supporting herself, and either did not or could not save money. By contrast, marriage to

Sidney has given Helen the means and the freedom to save for her future. With the $8300 Sidney contributed to pay off her mortgage, Helen was able to invest the full proceeds from the sale of her house into a $51,000 Hartford Life Insurance annuity. Sidney paid for a replacement for Helen's $3000 car, and he invested $2000 to set up an IRA account for her. Furthermore, when Helen began working at Hy-Vee, she continued to benefit from the marriage. The record shows that Helen was able to invest her savings from Hy-Vee into a $12,798 Woodmen annuity, as well as into two IRA accounts (one started by Sidney) valued at $9118 and $7934. Even when she was working, Helen did not have to contribute to her own living expenses. Helen entered her marriage with $28,000 in assets. Her net worth is now $115,000.

Contrary to Sidney's arguments, Helen is entitled to alimony. She contributed to the farm operation during the term of her marriage. Sidney has a greater ability to pay. However, after considering all of the factors, we believe the amount fixed by the district court is excessive. Two thousand dollars per month in permanent alimony is more than what is necessary for Helen to maintain the standard of living she enjoyed while married to Sidney, especially considering Sidney's current debt and his resulting reduced ability to pay. *In re Marriage of Stark,* 542 N.W.2d 260 (Iowa Ct. App. 1995). We modify the award by decreasing alimony to $1500/month. An extra $18,000 to supplement Helen's $16,000 income from Hy-Vee gives her an annual income of $34,000. This income will allow her to maintain the middle-class standard of living she enjoyed during her marriage. We further believe that a $1500/month award is more

practical, given the fact that much of Sidney's net worth is tied up in his farm operation and cannot realistically be liquidated. Given the provisions of the prenuptial agreement and Sidney's efforts to preserve his farm, the alimony award should not force Sidney to sacrifice his farm. Furthermore, although the record shows that Sidney may have substantial asset value, he also has a great deal of debt, specifically $1,301,576. *See In re Marriage of Fynaardt,* 545 N.W.2d 890 (Iowa Ct. App. 1996).

Finally we address attorney fees. In this case the district court awarded Helen $4000 in attorney fees. District courts have considerable discretion in awarding attorney fees in dissolution of marriage actions. *In re Marriage of Miller,* 552 N.W.2d 460 (Iowa Ct. App. 1996). To overturn an award of attorney fees in a dissolution of marriage action, the appellants must show that the trial court abused its discretion. *Id.* Sidney has failed to show the trial court abused its discretion.

AFFIRMED AS MODIFIED.