IN THE COURT OF APPEALS OF IOWA

No. 9-251 / 98-684
Filed August 27, 1999

IN RE THE MARRIAGE OF DALE SIEMS AND MYRA SIEMS

Upon the Petition of
DALE SIEMS,

Petitioner-Appellee/Cross-Appellant.

FILED
AUG 27 1999

And Concerning
MYRA SIEMS,

Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Floyd County, John S. Mackey, Judge

The petitioner appeals and the respondent cross-appeals from the economic provisions of the dissolution decree **AFFIRMED AS MODIFIED.**

Keith A. McKinley of Dunkelberg, McKinley, Folkers & Walk, Osage, for appellant.

Gaylen V. Hassman of Engelbrecht, Ackerman & Hassman, Waverly, for appellee.

Heard by Sackett, C.J., and Mahan and Zimmer, JJ. Vogel, J., takes no part.

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ZIMMER, J.

Dale Siems appeals and Myra Siems cross-appeals from the economic provisions of a decree entered by the district court dissolving their six year marriage We affirm with modification.

I. Background Facts and Proceedings. After signing an antenuptial agreement on December 17, 1991, Dale and Myra Siems married on December 21, 1991 This is Dale's second marriage and Myra's fourth marriage. Dale has four grown children from his previous marriage and is paying alimony in the amount of $2000 per month to his former spouse. Myra has a daughter by her first marriage

Dale is president of Sherman Nurseries in Charles City, Iowa. He has held that position since 1975. Sherman Nurseries is a wholesale grower of trees and shrubs At the time of trial, Dale was being paid an annual salary of $173,000 excluding benefits. He was also receiving Social Security income in the sum of $1,570 per month.

Myra and her third husband owned and operated the Charles City Shopper, a weekly advertising publication. Myra conducted advertising sales for this business from 1976 until 1987, when it was sold for $400,000. Myra received approximately $200,000 from this sale and continued to work at the business for another two years. Myra also sold advertising for the Charles City Press. Myra has a total of sixteen years experience in advertising sales. She obtained an associate of arts degree during the parties' marriage. Myra is in good health.

While Myra was separated from her third husband, the parties met and began a romantic relationship. They began living together in the late fall of 1990. Approximately six months before they married, the parties began discussing an antenuptial agreement. It was clearly understood by both parties that an antenuptial contract was a condition precedent to their marriage. The antenuptial agreement was negotiated for a six month period. A final agreement regarding the terms of the antenuptial agreement was reached on December 16, 1991, during a telephone conversation between the parties' attorneys.

On December 17, 1991, both parties went to the office of Dale's attorney to sign the final draft of the antenuptial agreement. Myra's attorney was not present at the time of the signing of the document due to a schedule conflict, but had previously reviewed the final draft with Myra and had explained to her the legal consequences of signing the document. Both parties were fully advised concerning the disclosure of all assets held by the other with financial affidavits attached to the final draft.

Among other things, the parties antenuptial agreement required Dale to obtain and maintain life insurance on his life in a sum of not less than $300,000. Dale was to maintain Myra as beneficiary under the policy and to maintain the policy unencumbered. Dale brought into the marriage a Northwestern Mutual Life Insurance (NMLI) policy, valued at $76,000 at the time the antenuptial agreement was signed. The antenuptial agreement also provided neither party would seek support or alimony in the event the marriage was dissolved.

At the time of the execution of the antenuptial agreement, Myra had a net worth of $223,500 and Dale had a net worth of $1,207,485.00. By the time of trial, Myra's net worth was $303,559 exclusive of any interest in jointly held real estate Dale had a net worth of $2,522,446.

During the parties' marriage, Dale provided complete support for Myra. Myra did not contribute financially to the marriage Dale paid all State and Federal income taxes on Myra's personal income starting with the tax year 1991 through and including the 1996 tax year Myra's total income during that period was approximately $109,000.

Dale paid for Myra's education during the marriage and contributed to the cost of insurance policies covering Myra and her son-in-law. During the marriage Myra kept up the home, cared for an expansive yard and planted an extraordinary number of shrubs and flowers. In 1993, the parties modified their antenuptial agreement to grant Myra joint tenancy in Dale's residence.

The parties enjoyed a high standard of living throughout the marriage utilizing primarily Dale's earnings. After filing the dissolution, Dale gave Myra $3,000 as a down payment on a condominium in Wisconsin and made a contribution to her attorney fees.

Dale filed a petition for dissolution of marriage on June 26, 1997. Following trial, the district court dissolved the marriage on December 29, 1997, but reserved jurisdiction to address the issues of division of property, spousal support, alimony,

attorney fees, court costs, and the effect of the antenuptial agreement. At the time of trial, Dale was 71 years old and Myra was 53.

A supplemental decree addressing the reserved issues was filed February 26, 1998. The trial court awarded Myra a lump sum cash settlement of $95,750 for her joint tenancy interest in the residence of the parties; one-half the net value of the parties' peony venture in the amount of $4,400; and all of her attorney fees. The court also found the parties had abandoned the alimony provision of the antenuptial agreement and awarded $800 per month rehabilitative alimony for forty eight months. Both parties filed 179(b) motions. In response to Myra's motion, the court awarded her the NMLI policy with a cash value of $104,499.30 as of February 12, 1998.

In his appeal, Dale raises four assignments of error. First, he contends the trial court erred in awarding Myra ownership of the NMLI policy. Second, he argues the trial court erred in awarding Myra one-half the value of the peony venture. Third, he contends the trial court erred in its award of alimony to Myra. Fourth, he contends the trial court erred in its award of attorney fees to Myra.

In her cross-appeal, Myra first contends she should receive full unencumbered ownership of the NMLI policy plus a cash award for the dividend and interest income therefrom since December 1997. She argues alternatively she should receive a cash lump sum payment representing the cash value plus dividends of the NMLI policy.

Myra also argues (1) the trial court undervalued the peony venture; (2) the monthly alimony award should be increased; (3) she should be awarded all of her trial attorney's fees including expert witness fees and costs advanced; (4) and the trial

court erred in concluding the legal description of the residence encompassed more property than the parties had intended to transfer under their 1993 joint tenancy conveyance. Finally, she urges Dale abandoned the antenuptial agreement in its entirety, and that she should therefore share in the growth experienced in his assets during their marriage.

II. Scope of Review. Our review of this equity action is de novo *See* Iowa R. App. P. 4. We give weight to the findings of fact made by the trial court, especially when considering the credibility of witnesses, but we are not bound by them. *See* R. App. P. 14(f)(7) We have a duty to exam the evidence anew, disconnected, ultimately, from the trial court's findings. *See In re Marriage of Siglin*, 555 N.W.2d 846, 849 (Iowa App. 1996).

III. Property Division. Iowa Code section 598.21(1) permits the court to consider the provisions of a antenuptial agreement when deciding equitable property division issues in dissolution proceedings. *See* Iowa Code § 598.21(1)(*l*) (1997); *In re Marriage of Spiegel*, 553 N.W.2d 309, 313 (Iowa 1996). In *Spiegel*, the Iowa Supreme Court laid out the rules governing the validity of antenuptial agreements:

> The person challenging the agreement must prove its terms are unfair or the person's waiver of rights was not knowing and voluntary. [T]he terms of an agreement are fair when the provisions of the contract are mutual or the division of property is consistent with the financial condition of the parties at the time of execution. Of course, the affirmative defenses of fraud, duress and undue influence are also available to void a prenuptial agreement, as with any other contract.

In re Marriage of Spiegel, 553 N.W.2d at 316 (citations omitted); *see also* Iowa code §§ 596.4, .8 (Iowa 1997). Under these criteria, the trial court found the parties

entered into a valid and enforceable antenuptial agreement on December 17, 1991. We agree.

The antenuptial agreement was negotiated over a six-month period with both parties represented by counsel. Several drafts of the proposed agreement were proposed and exchanged before a final contract was executed. Both Dale and Myra made a full disclosure of their assets held at the time of execution. Both parties understood an antenuptial agreement was a condition precedent to their marriage Myra acknowledges the transaction was not tainted by fraud and that she was not under duress or undue influence when the agreement was executed. We determine the antenuptial contract is valid and binding.

We now turn to the parties' modification of their antenuptial agreement In June of 1993, the parties began estate planning through the offices of attorney Robert S. Kinsey, III. As part of those proceedings, Dale and Myra decided to modify the antenuptial agreement by conveying to Myra a joint tenancy interest in Dale's residential property. Kinsey prepared a warranty deed at the parties' request with the only description the parties had available at that time.

We now consider the nature of the parties' 1993 modification to their antenuptial agreement. The extent of that modification is central to the issues presented by this appeal.

A. Northwestern Mutual Life Insurance Policy. Dale contends the trial court erred in awarding Myra ownership of the NMLI policy. The parties' antenuptial agreement contained the following provision regarding life insurance:

> 10. During the first five years of their marriage, as so long as the parties hereto are married and living together, First Party shall obtain and maintain life insurance on his life in a sum of not less than $300,000 and maintain Second Party as beneficiary under said policy and maintain said policy unencumbered. In the event the parties remain married and still residing together for five (5) years after the date of the marriage, the contemporaneously with said anniversary of their marriage, First Party shall transfer all the incidents of ownership of said life insurance policy to Second Party and First Party shall continue to maintain said life insurance so long as the parties mare married and still residing together. Said transfer shall release First Party's estate representatives and successors from all claims of every kind and nature by Second Party as surviving spouse.

After the parties were married, Dale was unable to obtain $300,000 worth of face value life insurance without paying an exorbitant premium due to then-existing health problems. He was able to obtain life insurance with a death benefit of $162,00 through Ameritas Insurance Company for an annual premium of approximately $10,000. He named Myra as beneficiary.

To provide the additional death benefit contemplated by the antenuptial contract, Myra agreed to be made beneficiary of Dale's NMLI policy which he had owned since 1976, fifteen years before the parties' marriage. At the time of the parties' marriage, the NMLI policy had a cash value of $76,000 and a death benefit of approximately $130,000. Dale had periodically borrowed against this policy to take advantage of various business opportunities. Shortly after the parties married, the policy was paid up.

At trial, the parties disputed the effect of the creation of the joint tenency in 1993. Dale argued the creation abrogated in its entirety the life insurance provision

of the antenuptial agreement. Myra argued the transfer was only intended to cancel the Ameritas policy, not void the entire provision.

The trial court concluded in its ruling on the parties' 179(b) motions "that the parties intended only to modify that portion of the antenuptial agreement with respect to life insurance by canceling only the Ameritas policy in exchange for Myra's one-half interest in the residence of the parties." The court then ordered the NMLI policy transferred to Myra. We agree with Dale's contention the court erred in awarding Myra ownership of the NMLI policy.

Myra testified the parties' modification agreement only provided for cancellation of the Ameritas policy. Dale testified the agreement called the complete abrogation of the insurance provision of paragraph 10 of the antenuptial contract. According to attorney Kinsey, Dale and Myra agreed the modification would abrogate the provisions of paragraph 10 which required Dale to maintain life insurance.

The conduct of Dale and Myra after modification of the antenuptial agreement supports Dale's position. After the modification agreement, Dale canceled the Ameritas policy, but voluntarily continued Myra as the named beneficiary under the NMLI policy. Myra was unaware she remained the beneficiary of the policy until several year later when she asked Dale if he would continue her as the beneficiary of the policy. Dale did not transfer ownership of the NMLI policy to Myra on the fifth anniversary of their marriage nor did Myra request that he do so.

The NMLI policy was purchased fifteen years before the parties married and had a cash value of $76,000 at the date of the marriage. The purpose of paragraph 10

of the antenuptial agreement was to provide insurance with a death benefit of $300,000. The NMLI policy was substituted only when Dale was unable to purchase insurance to meet the death benefit requirement at a reasonable rate. The record does not support the conclusion the parties ever contemplated Dale would make a gift to Myra of the premarital cash value of that policy. In addition, evidence was presented that had Dale purchased a $300,000 policy on January 1, 1992, it would have had a cash value of $95,975 on January 1, 1998. If the parties had carried out the terms of the antenuptial agreement without substitution of the NMLI policy and without modification of the agreement, this is the cash value of an insurance policy Myra would now own. As a result of the 1993 modification agreement, Myra has been awarded cash value in real estate in the amount of $95,750. We find it no mere coincidence the cash value of her part of the residence is nearly identical to the cash value of the insurance she would have received if the parties had carried out the terms of the original antenuptial agreement. Though we are inclined to defer to the trial court's witness credibility findings, we cannot not ignore the considerable evidence supporting Dale's position. We modify the trial court's decree to award the NMLI policy to Dale.

B. Joint Tenancy Deed. After dissolution proceedings commenced in 1997, it was discovered the legal description used in the 1993 warranty deed incorporated more property than the parties had intended for the creation of the joint tenancy. As a result, the trial court included the following provision in its decree:

> The court further concludes that the parties, by their conduct and mutual agreement, modified the antenuptial agreement with respect to the marital residence only and none of the other lots located in Siems' Sunset Acres Subdivision to Charles City, Iowa. The court concludes that Myra should be awarded one-half of the fair market value of the residence in accordance with the agreement of the parties, $95,750, and in exchange therefore that she shall execute and quit-claim all of her interest in and to said property to Dale.

Myra contends her marital interest in the marital residence should have been calculated based on the description of land contained in the 1993 deed rather than the description gleaned from their alleged intentions. We disagree.

We conclude there is ample evidence in the record to support the trial court's finding and conclusion that the 1993 deed did not reflect the true intention of the parties based on a mutual mistake of fact concerning the extent of the property included in the description used in the deed. The record reflects the parties intended to convey Myra an interest in land north and west of a road bordering the yard surrounding the residence. It was not until after dissolution proceedings were commenced that Myra was informed by her attorney that the description used in the deed also included land to the south of this road. In our de novo review, we affirm the district court on this issue.

C. The Peony Venture. Dale also challenges the trial court's property division in that the peony venture was not a joint project and that the trial court erred in awarding Myra one-half of the net value of the business. Myra contends the project was a joint venture, that she is entitled to one-half of its value, and that the trial court erred in undervaluing it.

Both parties enjoyed gardening and raising flowers as a hobby. In 1995 Dale suggested a new business venture involving the sale of dried peony blooms and plants. Dale rented land, tilled it at his expense, purchased cooling equipment, and purchased and planted approximately $20,000 worth of peonies. Myra's participation in the venture included research, contacts, vendor negotiations, and field work. Though the extent of Myra's involvement is disputed, we determine the trial court correctly concluded the peony project was a joint venture.

The trial court determined the "peonies venture" had a total net value of $8,800. Dale provided $20,000 for peony plants. The court found the venture had a gross value of $28,800 (12,000 clumps of peonies valued at $2.40 per clump). We determine the trial court's valuation was reasonable. Because the valuation of the property is within the permissible range of evidence, we will not disturb it on appeal. *See In re Marriage of Driscoll*, 563 N.W.2d 640, 643 (Iowa App. 1997).

IV. Alimony. The trial court awarded Myra $800 per month rehabilitative alimony for forty-eight months. Dale argues the trial court should not have awarded alimony. Myra contends the monthly award should be increased.

The trial court found Dale and Myra entered into a valid and enforceable antenuptial contract following a lengthy period of negotiation and with the benefit of counsel. The contract provides "neither party shall seek to receive a property settlement, support or alimony from the other." As our supreme court has previously noted, the issue of alimony requires special analysis given the circumstances of cases such as the one presently before us.

> In *Vande Kop v. McGill*, 528 N.W.2d 609, 613 (Iowa 1995), we 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 them. In 1992, as a part of the uniform premarital agreement act, Iowa Code section 596.5(2) was adopted, reestablishing our prior rule prohibiting these provisions 1991 Iowa Acts ch. 77, § 5.

In re Marriage of Spiegel, 553 N.W.2d at 319. The *Vande Kop* holding does not mandate, but rather merely makes permissible "consideration of a waiver provision in prenuptial contracts" written at the time the parties signed their prenuptial agreement. *See id.*

Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. *See In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989). Alimony is not an absolute right, and an award thereof depends upon the circumstances of each particular case. *See In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). When making or denying an alimony award, the trial court considers the factors set forth in Iowa Code section 598.21(3).[1] 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. *See In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996).

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[1] These factors include the length of the marriage, the age and health of the parties, their educational level and earning capacity, the feasibility of the party seeking alimony to become self-supporting at a comparable standard of living, any property distribution made in the decree, the tax consequences to each party, and the provisions of any antenuptial agreements. *See* Iowa Code § 598.21(3) (1997).

This was a marriage of relatively brief duration, lasting only five and one-half years. Myra's personal net worth increased by more than $80,000 from $223,500 at the time of her marriage to Dale to $303,559 at the time of trial. In addition, she was awarded a lump sum cash payment of $95,750 for her joint tenancy interest in the parties' residence. Myra was totally supported by Dale during the marriage and Dale paid all of the state and federal income taxes. Myra has fourteen years of experience in the sale of print media advertising and the operation of a shopper publication. She is fifty-four years old and in relatively good health. She completed an associate of arts degree at Dale's expense during the marriage. Finally, the parties jointly contracted for a waiver of alimony in their antenuptial agreement. Considering all relevant factors, an award of alimony is not justified under the circumstances of this case.

One other issue regarding alimony requires discussion. The trial court awarded "rehabilitative" alimony based on its conclusion the parties' conduct indicated an abandonment of the provision of the antenuptial agreement with respect to alimony. The court cited *In re Marriage of Christansen*, 543 N.W.2d 915, 918–919 (Iowa App. 1995) in support of this conclusion.

In discussing the issue of abandonment in the context of antenuptial agreements, the court of appeals observed in *Christensen*:

> Abandonment of a contract is the relinquishment, renunciation or surrender of a right. *See Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376, 380 (Iowa 1983). Whether or not an abandonment occurred depends upon the party's intent to abandon and acts

> evidencing such an intent. *Id.* The act of abandonment must be unequivocal and decisive. *Id.*

In re Marriage of Christensen, 543 N.W.2d 915, 918 (Iowa App. 1995) Our de novo review of the record does not reveal any conduct by Dale and Myra which indicates abandonment of the alimony provisions of their antenuptial agreement.

In view of all the foregoing, we modify the trial court's decree award by eliminating alimony.

V. Attorney Fees. The trial court awarded attorney's fees to Myra but did not specify the amount. Myra requests an award of $15,023.25 in trial attorney fees including costs advanced and expert witness fees. Dale contends trial attorney fees should be limited to the sum of $2,000, already paid by Dale. Myra also requests we award her appellate attorney fees. Though the matter of specifying the amount of trial attorney fees awarded should have been raised in the parties' 179(b) motions, we pass this problem and resolve the issue now

A. Trial Attorney Fees. An award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *See In re Marriage of Francis*, 442 N.W.2d 59, 67 (Iowa 1989). The test is whether the fee is reasonable and is based on the parties' respective abilities to pay *See In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa App. 1997). We affirm the award of trial attorney fees to Myra and fix the amount of those fees in the sum of $9,038.35.

B. Appellate Attorney Fees. An award of appellate attorney fees is not a matter of right, but rests within our discretion. *See In re Marriage of Scheppele*, 524 N.W.2d 678, 60 (Iowa App. 1994). In determining whether to award appellate attorney fees, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the decision of the trial court on appeal. We decline to award Myra appellate attorney fees.

VI. Conclusion. We modify the decree of the trial court by awarding the Northwestern Mutual Life Policy to Dale. We eliminate the award of alimony to Myra. We fix the amount of Myra trial attorney fees in the sum of $9,038.25. We affirm all other provisions of the decree. We award Myra appellate attorney fees of $1500.00. Court costs are taxed one-half to each party.

AFFIRMED AS MODIFIED.