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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001670-MR

CYNTHIA M. CARPENTER — APPELLANT

v.

APPEAL FROM MADISON FAMILY COURT
HONORABLE JEFFREY M. WALSON, JUDGE
ACTION NO. 05-CI-01281

BEN L. CARPENTER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND NICKELL, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Cynthia M. Carpenter seeks review of the family court's decision to enforce the parties' antenuptial agreement. Additionally, she contends that the trial court abused its discretion in failing to award her a sufficient sum in maintenance, funds for attorney fees and costs for expert witnesses, and that

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

the trial court erred in adopting findings of fact and conclusions of law tendered by the opposing party. After review of the record, we discern no error or abuse of discretion and affirm the decision of the family court.

The Carpenters were married for more than 16 years. It was the second marriage for both. They entered their marriage with individually owned property and assets. On the day before the wedding, they executed an antenuptial agreement. Declaring an "intent and desire to define and set forth the respective rights of each in the property of the other after their marriage," the agreement provided that any property owned separately by either party whether acquired before or after the marriage would remain separate property "without regard to the marriage[.]"

In support of her attack on the antenuptial agreement, Cynthia presented evidence that during the marriage she used her separate property to increase the value of Ben's separate property. The family court addressed this area of contention and found Cynthia's position lacking in credible evidence. Our review of the transactions supports the finding of the trial court. We observe that a trial court's findings will not be set aside unless clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. And, a finding is not clearly erroneous if it is supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1965). Here the evidence fails to verify Cynthia's claim.

Cynthia's argument that the antenuptial agreement should be discarded because of her contributions to Ben's business and personal life is

equally unpersuasive. "The opponent of the agreement has the burden of proving the agreement is invalid or should be modified." *Blue v. Blue,* 60 S.W.3d 585, 589 (Ky. App. 2001). While the evidence did show that Cynthia contributed to Ben's business and personal life, Ben likewise contributed to various business ventures Cynthia pursued separately. Enforcement or modification of an antenuptial agreement calls for the exercise of trial court discretion. *Lane v. Lane,* 202 S.W.3d 577, 579 (Ky. 2006). The family court carefully weighed Cynthia's contributions but found them insufficient to require modification of the agreement. Although last minute antenuptial agreements should be carefully scrutinized for lack of consent, the evidence presented in an effort to invalidate the agreement did not compel such a determination. Accordingly, there was no error with respect to enforcement of the antenuptial agreement in its entirety.

Ben filed for divorce in October of 2005, but the couple did not actually separate until February 2006. Throughout the marriage they filed joint tax returns and continued that practice for the 2005 tax year. This resulted in a federal tax refund of approximately $92,000 and a refund from the state of approximately $1,700. Cynthia claims the tax refunds should have been divided in just proportions. The family court determined that but for the antenuptial agreement the tax refunds would have been marital property and subject to division. However, it was not disputed that the refunds resulted entirely from Ben's overpayment of estimated quarterly taxes from income generated by his business. Pursuant to the antenuptial agreement, the funds were determined to be Ben's

separate property without any portion to Cynthia. There was no error in this regard.

Cynthia expended about $45,000 in legal fees and in excess of $10,000 on expert witnesses. Because of the alleged financial disparity of the parties, she requested payment of those fees pursuant to KRS 403.220. The family court required Ben to pay $20,000 of Cynthia's attorney fees but did not allow any payment for the remaining costs of litigation.

We have examined the family court's ruling and find nothing to convince us that it was arbitrary, unreasonable or unfair. Even when a disparity in financial resources exists, an award or denial of the payment of fees "is within the discretion of the court depending on the circumstances of each particular case." *Batson v. Clark*, 980 S.W.2d 566, 577 (Ky. App. 1998) (quoting *Kentucky State Bank v. AG Services, Inc*., 663 S.W.2d 754, 755 (Ky. App. 1984)). There is nothing in the record to support the conclusion that the family court abused its discretion.

Cynthia also claims that the amount of maintenance awarded was insufficient to meet her needs. This issue identifies our greatest concern in this case. It appears that Cynthia was denied an opportunity to present evidence she wished to present as to Ben's separate assets. On the other hand, there was a substantial quantity of evidence as to the parties' financial resources and income in the record from other sources. While limitation of a parties' evidence is of concern, a trial court is entitled to determine that additional evidence or evidence

directed at an uncontested issue is unnecessary. This seems to have been what happened here. By the time evidence was offered as to Ben's financial resources, the court had upheld the antenuptial agreement and Ben had stipulated that he had sufficient resources to pay maintenance. In such a circumstance, the focus pursuant to KRS 403.200(2) was on Cynthia. Though Ben's assets were not perhaps entirely irrelevant, Cynthia's needs under the statutory factors were predominant.

"[W]e will not disturb a trial court's award of maintenance unless the court 'abused its discretion or based its decision on findings of fact that are clearly erroneous.'" *Bailey v. Bailey,* 246 S.W.3d 895, 897 (Ky. App. 2007) (quoting *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003)). The family court noted that Cynthia has been engaged in a cat-breeding business that was losing almost $30,000 per year, and the court had previously suggested that she consider obtaining gainful employment. The court also found many of her monthly expenses "excessive," particularly the "substantial portion of the Wife's claimed monthly expenses relate[d] to credit card debt she ha[d] accumulated post-separation." The court concluded that there was no reason to require the husband to subsidize the money-losing business or pay for excessive post-separation debts. With those elements removed from the wife's monthly expenses, the amount and duration of maintenance was not inappropriate and certainly not an abuse of discretion.

Finally, Cynthia contends that the family court's use of Ben's proposed findings of fact and conclusions of law as its own was error. Her claim of error rests on the requirement that the trial court make findings of fact pursuant to CR 52.01, a sound requirement in the law. However, even had the family court adopted Ben's proposed findings of fact verbatim as Cynthia suggests "[i]t is not error for the trial court to adopt findings of fact which were merely drafted by someone else[,]" provided the final version actually reflects the court's thinking. *Prater v. Cabinet for Human Resources,* 954 S.W.2d 954, 956 (Ky. 1997).

As is not uncommon, the family court requested proposed findings of fact from both parties. Although some of Cynthia's claims appear to be extreme, we acknowledge that the family court's findings of fact are clearly based on those tendered by Ben. It is also clear that the family court made numerous changes in those tendered findings and appears to have been entirely familiar with the facts and issues involved in the litigation. We have no doubt that the decisions made were made knowingly by the court. *See Callahan v. Callahan*, 579 S.W.2d 385 (Ky. App. 1978). There was no error.

The judgment of the Madison Family Court is affirmed.

ALL CONCUR.

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