

STATE OF MICHIGAN
COURT OF APPEALS

AFIFEH AYAD BERRY,

Plaintiff-Appellant,

v

MICHAEL BERRY,

Defendant-Appellee.

UNPUBLISHED

May 19, 2000

No. 213488

Wayne Circuit Court

Family Division

LC No. 97-720147-DM

Before: Cavanagh, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. We affirm in part and remand for reconsideration of the issue of attorney fees.

The trial court determined that the division of the marital estate was governed by a prenuptial agreement. Plaintiff first argues that the trial court erred in refusing to allow parol evidence to be introduced to explain or vary the terms of the prenuptial agreement. We disagree.

Whether a contract is ambiguous is a question of law, which this Court reviews de novo. *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999). After reviewing the agreement in question, we agree with the trial court that the contract is clear and unambiguous as to its duration and, therefore, parol evidence was inadmissible to vary or clarify its terms. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). Thus, the trial court properly excluded plaintiff's testimony that defendant had told her that the agreement would expire after three years.

On the other hand, evidence of subsequent oral or written modifications of a contract are not excluded by the parol evidence rule. See *Michigan Nat'l Bank of Detroit v Holland-Dozier-Holland Sound Studios*, 73 Mich App 12, 14; 250 NW2d 532 (1976). Thus, the trial court improperly excluded evidence of the subsequent trust amendments. Nonetheless, it is undisputed that, under the terms of the amendments, plaintiff was not to become an income beneficiary of the trust unless the parties were still married and living together at the time of defendant's death. The trust amendments therefore do not evidence an intent to abandon or modify the divorce provisions of the prenuptial agreement. Therefore, the exclusion of this evidence was harmless error.

Plaintiff next argues that the trial court erred in enforcing the parties' prenuptial agreement. We disagree.

In deciding whether a prenuptial agreement is enforceable, a court should consider (1) whether the agreement was obtained through fraud, duress or mistake, or misrepresentation or nondisclosure of material fact; (2) whether the agreement was unconscionable when executed; and (3) whether the facts and circumstances have changed since the agreement was executed, so as to make its enforcement unfair and unreasonable. *Rinvelt v Rinvelt*, 190 Mich App 372, 380; 475 NW2d 478 (1991), quoting *Brooks v Brooks*, 733 P2d 1044, 1049 (Alas, 1987); see also *Booth v Booth*, 194 Mich App 284, 288-289; 486 NW2d 116 (1992). Here, plaintiff alleges that defendant misrepresented the duration of the agreement, that he failed to disclose the extent of his assets, that the agreement was unconscionable, and that circumstances had changed such that enforcing the agreement would be unfair and unreasonable.

In response to defendant's motion for summary disposition, the trial court found that plaintiff failed to show a genuine issue of material fact concerning misrepresentation and unconscionability. Our de novo review of the record fails to reveal any error with this ruling. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). Plaintiff's alleged failure to read the agreement may not support a claim for misrepresentation because plaintiff had the means to discover the truth, and was advised to consult an attorney. See *Webb v First of Mich Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). Further, notwithstanding any disparity in the parties' bargaining strength, the substantive terms of the agreement were not so unreasonable as to be unconscionable. *Hubscher & Son, Inc v Storey*, 228 Mich App 478, 481; 578 NW2d 701 (1998).

After an evidentiary hearing, the trial court found that plaintiff had failed to carry her burden of showing that the agreement was obtained without full disclosure of defendant's assets, and that plaintiff had failed to show a change in circumstances that would make enforcement of the agreement unfair and unreasonable. We review the trial court's findings of fact for clear error. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). Also, the court's dispositive rulings must be affirmed if fair and equitable. *Id.*

Two witnesses testified that the financial disclosure statement was attached to the agreement. The agreement itself, which bears plaintiff's signature, states that defendant's assets were disclosed and listed in an attached statement. Although plaintiff testified that the statement was not attached, she also stated that she did not examine the document closely. She further acknowledged knowing that defendant was very wealthy. In light of the foregoing, and giving due regard to the trial court's evaluation of the witnesses' credibility, we find no clear error in the trial court's determination that plaintiff failed to establish that the agreement was obtained without full disclosure of defendant's assets.

Plaintiff further argues that enforcement of the agreement would be unfair and unconscionable because of changed circumstances, those circumstances being plaintiff's medical problems, particularly with her feet, hips and lower back, and her decision to undergo a tubal ligation. Although plaintiff testified to the foregoing medical conditions, other evidence indicated that plaintiff's alleged medical problems were not as serious as she was claiming, and that she agreed to the tubal ligation surgery. The

court also considered evidence that plaintiff's ability to work would depend on her pain tolerance, which was subjective. The trial court expressly found that plaintiff's testimony was not credible regarding the extent of her medical problems. Giving due regard to the trial court's assessment of credibility, we find no clear error in its findings on this issue.

In accordance with the terms of the prenuptial agreement, the trial court awarded plaintiff one-third of the increase in the value of the non-trust assets and half of the equity in the marital home. In light of the terms of the prenuptial agreement, we conclude that the court's division of property was fair and equitable.

Plaintiff also argues that the trial court erred in awarding alimony of only \$1,000 a month for five years and medical benefits for three years. We disagree.

While the trial court recognized that there was a "huge income disparity" and a "very large educational disparity" between the parties, it also found that plaintiff's testimony regarding the extent of her medical problems was not credible, and that plaintiff had failed to show that she was unable to work. It is apparent from the record that the trial court considered all the relevant factors for deciding alimony and that its findings of fact on this issue are not clearly erroneous. *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996). In light of all the circumstances, including the voluntary relinquishment of rights contained in the prenuptial agreement and the award of half of the equity in the marital home, we conclude that the trial court's spousal support award is fair and equitable. *Sparks*, *supra* at 151-152.

Plaintiff next argues that the trial court erred in refusing to hold defendant in contempt for violating a pretrial restraining order against dissipating assets. A court's decision whether to issue an order of contempt is reviewed for an abuse of discretion. *Schoensee v Bennett*, 228 Mich App 305, 316; 577 NW2d 915 (1998).

We agree with plaintiff that the restraining order was intended to prevent dissipation of trust assets, and note that some trust assets are specifically mentioned in the order. However, because the court found that the prenuptial agreement was enforceable, plaintiff was not entitled to any trust assets. Further, defendant's removal of plaintiff as a trust beneficiary was of no moment, given that plaintiff was not entitled to benefits under the trust unless the parties were still married and living together at the time of defendant's death, a situation that was no longer possible in light of the parties' separation and divorce, while defendant was still living. Thus, the trial court did not abuse its discretion in refusing to hold defendant in contempt for engaging in the transactions involving the trust assets or for removing plaintiff as a trust beneficiary.

Next, plaintiff argues that the trial court abused its discretion in its award of attorney fees. A party in a divorce who is unable to bear the expense of attorney fees may recover reasonable attorney fees from the other party if the other party is able to pay. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999); see also MCR 3.206(C); MCL 552.13; MSA 25.93. Attorney's fees may also be authorized when the requesting party has been forced to incur expenses as a result of the other

party's unreasonable conduct in the course of litigation. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995); see also *Schoensee*, *supra* at 315.

Before trial, defendant had paid \$8,000 (his share of a joint Schwab account), plus another \$2,500, for a total of \$10,500, towards plaintiff's attorney's fees. He had not yet paid an additional \$10,000 ordered by the court. Plaintiff, on the other hand, had paid a \$1,000 retainer, plus her half of the Schwab account (\$8,000), for a total of \$9,000, but remained responsible for any unpaid fees. At trial, plaintiff was still liable for attorney fees in the amount of \$27,425. Defendant was ordered to pay \$10,000 forthwith, an unpaid balance of about \$17,425, which presumably would have to be paid out of plaintiff's share of the marital estate.

Defendant has never claimed an inability to pay. Further, the court found that there was a "huge income disparity" between the parties and that, even accepting defendant's testimony regarding his reduced post-retirement income, he would still earn more than twice what plaintiff was expected to earn, i.e., \$66,000 compared to \$25,000. However, the court declined to order the payment of any further fees because "[b]y my ruling I just gave [the wife] a lump sum of over two hundred thousand dollars and I see no need to award anything further."

A party should not be required to invade assets to satisfy attorney fees when they are relying on the same assets for support. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993); see also *Hanaway*, *supra* at 298-299. It is clear that plaintiff could not pay her attorney fees without invading the assets awarded to her for her own support. See *Maake*, *supra* at 189; *Hanaway*, *supra* at 298-299. It is also clear that defendant's income was at least twice what plaintiff could earn in a year, not counting his trust income, and that defendant had the ability to pay attorney fees. See *Kosch*, *supra* at 354. Further, the court never found that plaintiff's legal position was frivolous or unreasonable, or that she caused defendant to incur unnecessary expenses. *Hanaway*, *supra* at 298; *Schoensee*, *supra* at 315. To the contrary, the trial court found that the medical depositions were relevant to both the validity of the prenuptial agreement and the issue of spousal support, and that defendant relied upon them to his benefit. Medical testimony was also relevant to the division of other marital property, i.e., the parties' home. See *Sparks*, *supra* at 159-160.

In light of all the circumstances, we find that the trial court abused its discretion in not ordering defendant to pay a larger share of plaintiff's attorney's fees. Accordingly, we remand for reconsideration of plaintiff's request for reasonable attorney fees. See *Maake*, *supra* at 189; see also *Hanaway*, *supra* at 299.

Affirmed in part and remanded for reconsideration of plaintiff's request for reasonable attorney fees. No costs, neither party having prevailed in full. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ David H. Sawyer