IN THE COURT OF APPEALS OF IOWA

No. 7-231 / 06-0967
Filed September 6, 2007

IN RE THE MARRIAGE OF TRACIE GAYLE COBB
AND TYSON KING COBB

Upon the Petition of
TRACIE GAYLE COBB,
Petitioner-Appellee/Cross-Appellant,

And Concerning
TYSON KING COBB,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

Tyson and Tracie Cobb appeal and cross-appeal from the economic provisions of a dissolution decree. **AFFIRMED.**

Arthur L. Buzzell, Davenport, for appellant.

Daniel L. Bray of Bray & Klockau, P.L.C., Iowa City, for appellee.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

Tyson and Tracie Cobb appeal and cross-appeal from the economic provisions of a dissolution decree. We affirm.

I. Background Facts and Procedings

Tracie and Tyson met in 1988 and married in 1989. Three days before the marriage, they executed a premarital agreement. During the marriage, Tyson completed medical school and residency, received a master's degree in biomechanics, and earned significant wages as an orthopedic surgeon. Tracie maintained the home, raised the parties' four children and, in the early years, ran a home day-care service.

The parties divorced in 2006. At trial, the only issues were financial, as the parents agreed Tracie would assume physical care of the children.

On child support, the district court determined that Tyson's net monthly income was sufficiently high that the court had discretion to fix the amount of support. The court ordered Tyson to pay $10,000 per month for four children, $9000 for three, $8000 for two, and $7000 for one.

The parties reached a partial stipulation with respect to the property division but disagreed on the validity and effect of the premarital agreement. The district court upheld the agreement, concluding Tracie waived her right to "much of the property" accumulated by Tyson during the marriage. The court divided the property accordingly.

On the question of spousal support, the court found that the premarital agreement did not "clearly and directly set forth a waiver of any claim by either

party." The court ordered Tyson to pay Tracie $10,000 per month for ten years or until either party died or Tracie remarried.

The district court finally addressed Tracie's claim for trial attorney fees, ordering Tyson to pay $45,000 towards her bill.

Both parties filed motions for enlarged findings and conclusions. *See* Iowa R. Civ. P. 1.904(2). The court reduced Tracie's attorney fee award by $7900, the amount of attorney fees Tyson incurred to litigate the applicability of the premarital agreement. This appeal followed.

II. Child Support

Tyson contends the district court should not have ordered him to pay child support of $10,000 per month for four children. We discern no inequity in this ruling. As the district court noted, Tyson's net monthly income was "approximately five times the amount of the maximum net income on the chart." *See* Iowa Ct. R. 9.26. In this range, a district court is vested with discretion to determine the appropriate amount of support. *Id.* The court used Tyson's income in 2005, which was approximately half his income in 2004. One-fifth of his net monthly income was allocated to the support of his four children. Had Tyson been subject to the guidelines, this percentage could have been higher.

III. Spousal Support

Tyson contends the district court acted inequitably in awarding Tracie spousal support. In his view, the premarital agreement prohibits such an award. On cross-appeal, Tracie maintains she should have received $23,900 of spousal support per month instead of the $10,000 per month that the district court

ordered, and the award should have continued beyond ten years until her death or remarriage, and for 108 months regardless of remarriage.

A. Effect of Premarital Agreement

As noted, the parties executed a premarital agreement in 1989. The agreement was executed in Texas and provides that Texas law will govern its construction and enforcement.[1]

The agreement further provides that

> any post-dissolution earnings shall be the separate property of the earning spouse and neither of the parties shall be entitled to contribution from the other for post-dissolution earnings from college degrees during the existence of marriage.

The agreement additionally states that Tracie "waives and releases, all rights, claims, titles, and interests, actual, inchoate, or contingent, that either might, by reason of marriage to the other, acquire in the property or estate." Tyson

[1] Tyson asserts that the contractual provision mandates application of Texas law. Tracie counters that Iowa law should apply because Texas law would "violate a fundamental policy of this state," and Iowa "would otherwise provide the applicable law and has a materially greater interest in the determination of the particular issue." Our highest court requires parties relying on out-of-state law to prove it. *Pennsylvania Life Ins. Co. v. Simoni,* 641 N.W.2d 807, 811 (Iowa 2002). As Tyson has furnished a citation to the relevant Texas statute on premarital agreements, we conclude he has proven the applicable law.

On the conflict-of-law question, our highest court applies the significant relationship test to contract cases, if there is no choice-of-law provision in the contract. *Gabe's Const. Co., Inc. v. United Capitol Ins. Co.,* 539 N.W.2d 144, 146 (Iowa 1995). *See* Restatement (Second) of Conflict of Laws §188(1), at 575 (1971). *See also Restatement (Second) of Conflict of Laws* § 187(1), at 561 (stating "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue"). Here, the parties chose Texas law and the property issue is one they "could have resolved by an explicit provision in their agreement directed to that issue." Therefore, we will apply the Texas statute on premarital agreements cited by Tyson as well as the case law that is an outgrowth of that statute. *Cf. In re Marriage of Welchel*, 476 N.W.2d 104, 110 (Iowa Ct. App. 1991) (applying significant relationship test to decide whether Texas or Iowa law applies to spouse's interest in movables acquired during the marriage, in the absence of an effective choice of law by the spouses).

maintains that the quoted language "clearly provides that Tracie cannot make a claim against Tyson's post-dissolution earnings" or his "property or estate." He continues, "[t]here is no provision in the Agreement that reserves for Tracie the right to claim spousal support, alimony, or maintenance."

We agree with Tyson that a claim for "spousal support, alimony, or maintenance" is not expressly reserved. However, a claim for "spousal support, alimony, or maintenance" also is not expressly waived. Had the parties intended to waive their rights to alimony, they could have provided for a waiver of "alimony" or "spousal support." *See Pearce v*. *Pearce*, 824 S.W.2d 195, 200 (Tex. App. 1991) ("A marital agreement should be interpreted according to the true intentions of the parties as expressed in the instrument."). Neither term was foreign to Texas law at the time. *See Winfield v. Daggett*, 775 S.W.2d 431, 432 (Tex. App. 1989); *Mullins v. Wright,* 772 S.W.2d 580, 581 (Tex. App. 1989). *Cf. McClary v. Thompson,* 65 S.W.3d 829, 838-39 (Tex. App. 2002) (noting "plain and unambiguous language" of premarital agreement did not address and, therefore, did not affect "the character of the contributions, interest, or benefits accrued in the retirement account of the parties during the marriage as community property"); *Schecter v. Schecter*, 579 S.W.2d 502, 506 (Tex. App. 1978) (noting premarital agreement made reference to temporary alimony).

B. Spousal Support Factors

In the absence of operative language in the premarital agreement, the district court appropriately considered Iowa's statutory factors governing the issue. *See* Iowa Code § 598.21(3) (2005). On our de novo review, we agree that those factors militate in favor of a spousal support award.

Tracie was forty-five years of age at the time of dissolution. The parties were married for seventeen years.

Although Tracie received a bachelor's degree in computer science, that degree was dated. Additionally, Tracie was not working in the field at the time of the marriage and did not work in the field during the marriage. She testified the degree was "basically worthless." Tracie also began law school prior to the marriage but did not complete her studies and did not use her limited legal education in the workplace.

Tracie has a health condition known as Graves disease. Although she testified that the hyperthyroid condition did not preclude her from employment and was generally controlled with medication, she stated there were times when she continued to feel "very tired" or "too active."

Tracie had negligible earnings during most of the marriage. As the district court noted, Tyson, in contrast, earned a "handsome" income that allowed the parties to live in exceptional comfort. There is no question that he had the financial ability to pay spousal support in addition to child support.

Turning to the amount of the award, the record does not support Tracie's request for $23,900 per month. While we recognize she is entitled to support that will allow her to maintain the comfortable lifestyle she enjoyed during the marriage, *In re Marriage of Clinton,* 579 N.W.2d 835, 839 (Iowa Ct. App. 1998), certain expenses listed by her were not supported by her testimony. For example, her spousal support request included $2200 per month for vacations and trips, but she testified that she and the children rarely took the types of lavish vacations that Tyson enjoyed on his own. We conclude the sum of $10,000 per

month awarded by the district court properly accounted for the level of comfort Tracie had grown accustomed to.

As for the duration of the award, we conclude the district court's ruling is equitable. The court awarded spousal support until the youngest child graduated from high school and for "a brief period of time" after that, to allow Tracie to prepare herself for employment. Given Tracie's age and conceded ability to engage in gainful employment, we see no reason to extend the award until her death or post-remarriage.

IV. Property

The district court determined that the premarital agreement governed the property distribution. Tracie takes issue with this aspect of the court's decree. She contends the premarital agreement should have been invalidated, deemed abandoned, or been interpreted to render it "substantively fair," which in her view, required an equal distribution of the property.

"The validity and enforceability of the premarital agreement is determined by the law in effect at the time the divorce decree was signed." *Grossman v. Grossman,* 799 S.W.2d 511, 513 (Tex. App. 1990). That law, set out in Texas Family Code section 4.006 (2005), provides:

> (a) A premarital agreement is not enforceable if the party against whom enforcement is requested proves that:
>
> (1) the party did not sign the agreement voluntarily; or
>
> (2) the agreement was unconscionable when it was signed and, before signing the agreement, that party:
>
> (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> (B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial

> obligations of the other party beyond the disclosure provided; and
> (C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.
> (b) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.
> (c) The remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses.

The district court found that Tracie signed the agreement voluntarily. *See* Tex. Fam. Code § 4.006(a)(1). This finding is supported by the record and precludes invalidation of the agreement under subsection 1. *Cf. Sheshunoff v. Sheshunoff*, 172 S.W.3d 686, 698 (Tex. App. 2005) (concluding party failed to generate fact issue on voluntary execution defense).

Turning to subsection 2, the district court did not explicitly decide whether the agreement was unconscionable. *Id.* at 4.006(a)(2). However, the court essentially found that Tracie could have had adequate knowledge of the property or financial obligations of Tyson, had she taken the time to investigate. Tex. Fam. Code § 4.006(a)(2)(C). This finding, also supported by the record, precludes invalidation of the agreement under subsection 2.

Tracie's assertion that the spouses abandoned the premarital agreement also must fail. As Tyson points out, Texas law only authorizes revocation of a premarital agreement in writing. Tex. Fam. Code § 4.005 ("After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties."). There is no indication that the parties complied with this provision. Tracie has not pointed to Texas case law that authorizes abandonment of a premarital agreement in other circumstances.

Based on our analysis of Texas law, we conclude the district court did not err in determining that the premarital agreement was enforceable.

We are left with Tracie's argument that the agreement should be interpreted to render it substantively fair. Section 4.006 does not provide for such an added analysis and Tracie does not point to Texas case law adopting such an analysis. *Cf. Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex. App. 1989) (overruled on other grounds in *Twyman v. Twyman*, 790 S.W.2d 819 (Tex. App. 1990)) ("Parties should be free to execute agreements as they see fit and whether they are "fair" is not material to their validity."). Having rejected this argument, we need not address Tracie's related argument that two limited liability corporations should be revalued and the property division reconfigured to provide for an equal division. The parties stipulated that the two LLC's were owned by Tyson and should be awarded to him. This is consistent with the premarital agreement, which provides "that other such property coming to either of them during their marriage will be their respective separate property." Pursuant to this provision, Tyson was entitled to the property irrespective of its value.

In light of the enforceable premarital agreement, we also need not address Tracie's contention that her contributions to the advancement of Tyson's career should be factored into the property division.

V. Trial Attorney Fees

Tyson contends the district court's award of fees is inconsistent with the attorney fee provision of the premarital agreement. Tracie responds that the court should leave the award at $45,000 "[i]f the premarital agreement is

determined by the appellate court to be unenforceable or abandoned by the parties."

The premarital agreement authorizes the payment of attorney fees, as follows:

> If either party brings an action or other proceedings to enforce this agreement or to enforce any judgment, decree, or order made by a Court in connection with this agreement, the prevailing party shall be entitled to reasonable attorney's fees and other necessary costs from the other party.

This provision authorizes the payment of fees incurred by the prevailing party in an action to enforce the agreement. Therefore, the district court appropriately offset the $7900 for fees and costs Tyson incurred in litigating the validity of the agreement.

Turning to Tyson's assertion that the district court should have reduced the award even further, our highest court has stated "the trial court has the ability to assess the services rendered and their relationship to the various matters at issue." *Equity Control Assoc., Ltd. v. Root*, 638 N.W.2d 664, 674 (Iowa 2001). In addition to the validity of the premarital agreement, the parties litigated child support and spousal support issues at trial. Following trial, Tracie's attorney proffered an itemized billing statement listing total charges of $46,293.43. These issues were not governed by the premarital agreement and the attorney fee provision contained within it. In his post-trial motion, Tyson's attorney did not attempt to quantify Tracie's attorney fees that were expended in litigating the validity of the premarital agreement versus the attorney fees that were expended on these other issues. He simply stated, "[t]he majority of the attorney's fees awarded to the Petitioner covered services incurred in attempting to defeat the

application of the Agreement." On this record, we cannot conclude the district court abused its discretion in declining to reduce the $45,000 award any further. *In re Marriage of Wessels,* 542 N.W.2d 486, 491 (Iowa 1995) (setting forth standard of review).

VI. Appellate Attorney Fees

Tracie requests an award of appellate attorney fees and costs. An award rests within the discretion of the court. *In re Marriage of Gonzalez,* 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). Although Tracie was obligated to defend the appeal, a significant portion of her brief and argument addressed her cross-appeal issues on which she did not prevail. Accordingly, we decline to order Tyson to pay anything toward her appellate attorney fee obligation.

AFFIRMED.