IN THE COURT OF APPEALS OF IOWA

No. 1-632 / 10-1919
Filed January 19, 2012

IN RE THE MARRIAGE OF JULIANNE R. SCHENKELBERG AND GARY W. SCHENKELBERG

Upon the Petition of
JULIANNE R. SCHENKELBERG,
Petitioner-Appellant,

And Concerning
GARY W. SCHENKELBERG,
Respondent-Appellee.

Appeal from the Iowa District Court for Carroll County, Joel E. Swanson, Judge.

Julianne Schenkelberg appeals the district court's decree dissolving her marriage to Gary Schenkelberg. **AFFIRMED.**

J.C. Salvo and Bryan D. Swain of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for appellant.

Gregory J. Siemann of Green, Siemann & Greteman, P.L.C., Carroll, for appellee.

Considered by Vogel, P.J., Eisenhauer, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

SACKETT, S.J.

Julianne R. Schenkelberg appeals challenging the district court's decision (1) finding she and Gary W. Schenkelberg had an enforceable premarital agreement that limited her rights to Gary's property, (2) in not awarding her sufficient alimony, and (3) in failing to assess expert witness fees to Gary. We affirm.

BACKGROUND. Julianne and Gary married in Las Vegas, Nevada, on July 4, 1994. They both had recently been divorced. Julianne had four children with her former husband, and Gary had six with his former wife. These children have now all reached their majority.

In November 1993, Julianne went with Gary to visit Gary's attorney, Allen Nepper. Nepper, who practiced law in Denison, had represented Gary in his first divorce. Julianne testified she went with Gary to support him because he was unhappy about the outcome of his divorce from his first wife, and he apparently was considering an appeal. She said Nepper gave Gary legal advice, and she observed and told Gary to try and get over it because that was what she was trying to do after her divorce. She said at that time she and Gary were friends helping each other through rough situations and they eventually began dating. Nepper testified at this meeting in passing he said, "If you're going to get married again, you're going to get a premarital agreement, and that was it."

Nepper further testified Gary made an appointment to see him in his office on May 12, 1994, and Julianne came in the office with Gary. Julianne denied that she did. Nepper said the appointment was to discuss a premarital

agreement and he prepared a list of Gary's assets from the financial statement in his dissolution file and a list of Julianne's assets from the financial statement in her divorce. He further testified that he took the preliminary information for a premarital agreement and he learned the couple planned to marry on July 4, 1994.[1]

On June 29, 1994, before leaving for the planned wedding in Las Vegas, Nevada, Gary and Julianne both signed a document captioned "PREMARITAL AGREEMENT." The agreement was less than four full pages[2] plus an Exhibit A and an Exhibit B that detailed the assets and liabilities of each party. The agreement principally provided property owned by either party at the time of the marriage and acquired and/or accumulated during the marriage was to be the separate property of each, and they waived all rights with respect to the property or estate of the other including "but not limited to, inheritance, distributive share, homestead or dower." It also stated that all property of each shall be retained for the benefit of his or her heirs, legal representatives, and assign, as though no marriage relationship ever existed.[3] They represented they had each made a full disclosure or their property, debts, and earnings. Their financial disclosures represented Gary had assets of $320,218 and indebtedness of $256,074 and Julianne had assets of $28,200 and debts of $2300. The agreement also provided that they each had the opportunity to consult independent legal counsel.

[1] His testimony was supported by his appointment book and notes he took at the time.
[2] The document was single spaced with double spaces between paragraphs.
[3] There was also a provision that provided some property to be co-mingled and equally divided under specific conditions.

There also was a signed certification of Nepper certifying he was the attorney for Gary, and had consulted with Gary who acknowledged his understanding of the agreement and willingly executed it in Nepper's presence. In addition, there was an affidavit signed by Julianne acknowledging that Nepper was not acting on her behalf in drafting the agreement for Gary. She further acknowledged that she had the right to an attorney to represent her interests, and she had not been given any promises, which would have induced her not to obtain legal counsel. It also stated that any failure to obtain her own attorney was a free and voluntary decision.

Gary testified the agreement was signed by Julianne on June 29, 1994, in the office of Denison attorney Julie Schumacher, who notarized Julianne's signature on the document. Gary also testified Schumacher reviewed the document with Julianne. Schumacher testified she had no memory of the encounter and noted that her office records for the day did not show a charge for legal advice to Julianne. However, she did testify that she would not have notarized the document if she had not seen Julianne sign it.[4]

On January 12, 2009, Julianne filed a petition seeking dissolution of the marriage, a division of the parties' property, temporary and permanent alimony, and attorney fees. Gary's financial position had improved substantially. Julianne's had not. The court awarded Julianne temporary alimony of $5000 a month and ordered Gary pay $7500 in temporary attorney fees.

[4] Schumacher signed as a notary both as to Julianne's signature on the agreement and Julianne's affidavit which acknowledged Nepper represented Gary and that she had the right to an attorney to represent her interest.

Gary sought to have the dissolution court follow the prenuptial agreement, and Julianne contended it should not be enforced. Gary asked for a bifurcated trial on the issue of the agreement and it was held. In addressing the claim the district court said.

> In the dissolution of Gary Schenkelberg's first marriage, Allan Nepper, . . . represented him. As a result of that proceeding, Gary Schenkelberg was convinced that a prenuptial agreement was mandatory in the event that he remarried. In November 1993, Gary Schenkelberg accompanied by Julie Buchanan n/k/a Julie Schenkelberg, went to Allan Nepper's office where Gary Schenkelberg expressed his displeasure with the results of his first dissolution. Allan Nepper discussed a prenuptial agreement which would address some of the concerns of Gary Schenkelberg. It was agreed that Allan Nepper would prepare a rough draft of some agreement. In May 1994, Gary Schenkelberg accompanied by Julie Buchanan, went to Allan Nepper's office, again discussed the prenuptial agreement which Mr. Nepper had prepared. A discussion was conducted concerning assets of both parties, which was a requirement of full disclosure in any prenuptial agreement. The testimony of Allan Nepper, along with the Petitioner and the Respondent, verifies that Julie Buchanan and Gary Schenkelberg were interested in maintaining separate assets as both had children by their previous marriage and wished to insure that their children would receive assets that each had accumulated. The PREMARITAL AGREEMENT as ultimately prepared by Allan Nepper contained Exhibit A which was the list of assets and estimated values of Gary Schenkelberg along with his indebtedness. Exhibit B was a list of assets of Julie Buchanan along with a list of her estimated debts.
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> The parties returned to the office of Allan Nepper on June 29, 1994, at which time Allan Nepper presented the PREMARITAL AGREEMENT which included attached Exhibits A, B, C and D.

The district court found Nepper had explained to Julianne that he represented Gary, and had prepared the agreement from information provided to him. The court determined the agreement enforceable. Julianne filed, with the Iowa Supreme Court, an application for an interlocutory appeal from this finding, which the court denied.

The issues of property, support, and attorney fees came before the district court. The parties filed a pretrial stipulation that included the resolution of several issues including the disposition of their home, the allocation of vehicles, division of the cash value of life insurance policies, division of debt, and division of some personal property. The division left Julianne with nearly $300,000 in assets.

After the hearing the district court reaffirmed its position that the prenuptial agreement was a valid and binding contractual agreement. The court incorporated in the decree the parties' agreement as to the distribution of certain assets. The court gave Gary one horse and Julianne two horses. The district court found Gary's average income over the past five years was $208,000. It found Julianne had somewhat exaggerated her monthly expenses. The court ordered Gary to pay Julianne alimony of $5000 a month until she reached the age of sixty-two, dies, remarries, or cohabits with another man, whichever occurs first. The court further ordered that if by the time Julianne reached sixty-two years the spousal support was not terminated by one of the conditions above, the support should decrease to $2000 a month payable to Julianne until she reaches seventy, remarries, or cohabits with another man, whichever occurs first.

Gary was ordered to pay $30,000 towards Julianne's attorney fees. The court denied Julianne's request to tax $17,050 to Gary for her expert witness fees. Costs at the district court were to be paid seventy-five percent by Gary and twenty-five percent by Julianne.

Post-trial motions were filed by Julianne. The district court amended its decree to provide a definite starting time for alimony to be paid and omitted the

provisions that alimony should cease if Julianne cohabits with another man. Other challenges were denied.

DIVISION OF PROPERTY. Julianne contends the property division was not equitable, and the prenuptial agreement was procedurally and substantively unconscionable. Gary contends the division is equitable and the agreement is not unconscionable.

Scope of Review. In *In re Marriage of Shanks*, 758 N.W.2d 506, 510–11 (Iowa 2008), the court said:

> Dissolution proceedings are equitable actions, which we review de novo. Iowa R. App. P. 6.4.[5] Although in *Spiegel*[6] we noted premarital agreements are construed in the same manner as ordinary contracts, we exercised de novo review of the validity of the agreement at issue in that case. Thus, the general rule is that issues concerning the validity and construction of premarital agreements are equitable matters subject to our de novo review.

(Internal citations omitted.)

Premarital Agreement. Historically the courts viewed premarital agreements, which contemplated and made provision for divorce, as a violation of public policy. In recent decades the courts have reconsidered this public policy in light of societal changes, and today premarital agreements, so long as they do not promote divorce or otherwise offend public policy, are generally favored as conducive to the welfare of the parties and marriage relations as they tend to prevent strife, secure peace, and adjust, settle, and generally dispose of rights in property. In Iowa, premarital agreements executed on or after January 1, 1992, are subject to the requirements of the Iowa Uniform Premarital

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[5] Now Iowa Rule of Appellate Procedure 6.907.
[6] *In re Marriage of Spiegel*, 553 N.W.2d 309, 316 (Iowa 1996).

Agreement Act (IUPAA), codified in Iowa Code chapter 596. Iowa Code § 596.12 (2009); *Shanks*, 758 N.W.2d at 511. The IUPAA provides three independent bases for finding a premarital agreement unenforceable:

> A premarital agreement is not enforceable if the person against whom enforcement is sought proves any of the following:
>
> (1) The person did not execute the agreement voluntarily.
>
> (2) The agreement was unconscionable when it was executed.
>
> (3) Before the execution of the agreement the person was not provided a fair and reasonable disclosure of the property or financial obligations of the other spouse; and the person did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other spouse.

Iowa Code § 596.8.

1. Voluntarily Executed. "While broad notions of procedural fairness were relevant in Iowa to the determination of voluntariness challenges to premarital agreements executed prior to January 1, 1992, the IUPAA has significantly altered and clarified the voluntariness inquiry for agreements executed after that date." *Shanks* 758 N.W.2d at 512. Iowa law no longer requires the agreement to satisfy the "knowing and voluntary" test of "procedural fairness" but instead requires only that the agreement be executed voluntarily. *Id*. While the term "voluntary is not defined in the IUPAA, we have applied the definition from Black's Law Dictionary which defines "voluntarily" as "[i]ntentionally; without coercion." Black's Law Dictionary 1605 (8th ed. 2004); *Shanks*, 758 N.W.2d at 512. Now we look to see whether the execution of the premarital agreement was free from duress and undue influence when determining if it was voluntarily executed. *Shanks*, 758 N.W.2d at 512. Julianne admitted she signed the agreement voluntarily. Therefore, she holds the burden

of proof to show duress or undue influence as required under section 596.8(1) to establish a premarital agreement was involuntarily executed. *Id.*.

a. Duress. The two essential elements to prove a claim of duress in the execution of a contract are "(1) one party issues a wrongful or unlawful threat and (2) the other party had no reasonable alternative to entering the contract." *Id*. Julianne does not contend that Gary asked her to sign the premarital agreement in contemplation of marriage[7] or that he gave her an ultimatum. Rather the evidence showed it was being made for reasons that if either of them died, their property would go to their children and not an ex-spouse.[8] The agreement was drawn so the property of either would go to that person's children and not to the other party to the agreement. Julianne could have not signed the agreement or refused to marry Gary if the terms were not to her liking. *See id.* (noting the complaining party had the reasonable alternative of cancelling the wedding in the face of a threat to sign the agreement); *Spiegel*, 553 N.W.2d at 318 (same). The facts here fall far short of a showing of duress sufficient to support the claim that she did not voluntarily sign the agreement.

b. Undue Influence.

> Undue influence is influence that deprives one person of his or her freedom of choice and substitutes the will of another in its place. "[M]ere importunity that does not go to the extent of controlling the will of the grantor does not establish undue influence." Freedom from undue influence is presumed.

Shanks, 758 N.W.2d at 513 (citing *Spiegel*, 553 N.W.2d at 318).

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[7] There was a finding by the court that Gary said he would not remarry without a premarital agreement.

[8] They were getting on an airplane the next afternoon and they wanted their assets protected if the airplane crashed.

Apparently Julianne's position is the fact that Gary engaged the lawyer who drafted the agreement put him in such a position of power that she was willing to put her full faith in his judgment in drafting an agreement. Such an argument was rejected in *Shanks* where the wife argued the husband's position as a lawyer, and his status as her fiancée and employer, put the husband in such a position of power over her that she was willing to put her full faith in his judgment in drafting the agreement. 758 N.W.2d at 513. The court found that "despite the potential for abuse inherent in the parties' complex relationship, . . . the evidence presented was insufficient to establish undue influence." *Id*.

Looking at the fact the evidence in *Shanks* was insufficient to establish undue influence, it is clear the facts here also fall short of doing so. Here, the district court found that Gary and Julianne were twice in Nepper's office to discuss the agreement before it was signed. In the initial visit Nepper talked about an agreement and both parties wanted to keep their assets separate to insure their children would receive the assets each had accumulated. The facts do not demonstrate the "improper or wrongful constraint, machination, or urgency of persuasion" required to find undue influence. *See Stetzel v. Dickenson*, 174 N.W.2d 438, 443 (Iowa 1970). We are not persuaded Gary's will was substituted for Julianne's own judgment in deciding to sign the agreement. *Spiegel*, 553 N.W.2d at 319. Having found the premarital agreement was not a product of duress or undue influence, we conclude Julianne has failed to prove she executed the agreement involuntarily.

2. Unconscionability. The next question is whether the agreement is unconscionable and therefore unenforceable. *Shanks*, 758 N.W.2d at 513. "Review of premarital agreements for 'unconscionability' is substantially more circumscribed than review for mere inequity." *Id.* at 514.

The IUPAA does not define "unconscionability" in the context of premarital agreements. However, the UPPA's comments indicate it should be interpreted similarly to the standard used in commercial and contract law, "where its meaning includes protection against one-sidedness, oppression, or unfair surprise." *Id.* In addition, the term should be interpreted as it is used in the context of negotiations between spouses to include "protection against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other." *Id*.

> In order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties resulting from the agreement, and any other relevant evidence such as the conditions under which the agreement was made, including the knowledge of the other party.

Id.

In *Shanks* the Iowa court said

> In considering claims of contractual unconscionability, we examine the factors of "assent, unfair surprise, notice, disparity of bargaining power, and substantive unfairness." It is not sufficient that a party made an imprudent bargain:
>
> "People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fair-minded person would view the ensuing result

> without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability."

Id. at 515 (citing *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 181 (Iowa 1975), and *Smith v. Harrison*, 325 N.W.2d 92, 94 (Iowa 1982)).

Although the Iowa court has not adopted a precise definition of "unconscionability," in *Shanks* it found a review of cases illustrates the concept "is not a means by which a party may escape the requirements of an unfavorable contract after experiencing buyer's remorse." *Id.* at 515–16. "Thus, absent an unconscionable bargaining process, a court should be hesitant to impose its own after-the-fact morality judgment on the terms of a voluntarily executed premarital agreement." *Id.* at 516. A question to look at is "whether the terms of the agreement are so harsh or oppressive 'such as no [person] in [their] senses and not under delusion would make' such a bargain." *Id*. (citing *Casey v. Lupkes*, 286 N.W.2d 204, 207(Iowa 1979)).

The provisions of the agreement in this case are mutual in scope. It sought to maintain the parties' premarital assets as separate property and to perpetuate their premarital financial conditions throughout the marriage. They both did it to protect their assets for their children. The parties agreed to maintain separate property during the marriage. There is evidence that Gary took care of the business and they kept most of their financial affairs separate.

There also is the question of whether an advantaged party exploited a disadvantaged party's lack of understanding or unequal bargaining power. *Id.* at 517. Julianne was given the opportunity to seek her own counsel.

> Equitable principles will not permit a party to eschew an opportunity to consult counsel as to the legal effect of a proposed contract, execute the contract, and then challenge the enforceability of the agreement on the ground she did not have adequate legal advice.

Id. at 518.

Both parties had recently been through a divorce. They both had counsel for those proceedings. Both parties had experience in business. There is no evidence that either had any expertise in the law of premarital agreements—as contrasted to *Shanks* where the husband was an attorney. *Id*.

In looking at the time factor there is evidence, if believed, that Julianne did consult with an attorney, and she kept repeating she did not want Gary's money. It was not Gary's attorney's duty to explain the nature or value of the rights she was relinquishing. He explained that he was not her attorney and that he represented only Gary's interest.

Both parties communicated their desire for a premarital agreement to protect their assets for their children. Julianne made it clear she was not marrying Gary for his money, and acted accordingly by acquiescing, without thorough investigation or objection, to a premarital agreement that facilitated her marriage. *Id.* at 518–19. Julianne's words and actions demonstrate she placed a higher value on marriage and Gary's companionship than the opportunity for greater financial security.

While Gary now is in a much stronger financial position than is Julianne, their positions at the time the agreement was signed were not that different.

3. Fair and Reasonable Disclosure. It appears that Iowa Code section 596.8(3) was met as each party provided a fair and reasonable disclosure of the

property and financial obligations. Section 596.8(3) requires only "fair and reasonable" disclosure, or that the party could have had "adequate knowledge" of the other party's property or financial obligations. Julianne has failed to carry her burden to prove the premarital agreement is unenforceable under section 596.8.

ALIMONY. Julianne also contends that she should have been awarded additional alimony. She argues and we agree that Gary's income is substantially more than hers. She says that the trial court erred in finding she had the ability to support herself; and while we agree that she may have some difficulty in reentry to the job market, it is clear she has skills which render her employable, but in all probability at a wage substantially less than what Gary may make.

Alimony is not an absolute right. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). "An award depends upon the circumstances of each particular case." *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa Ct. App.1996). The court is allowed to consider the property division in connection with the alimony award. *See In re Marriage of Probasco*, 676 N.W.2d 179, 184 (Iowa 2004). We only disturb the district court's determination if there is a failure to do equity. *Anliker*, 694 N.W.2d at 540. An award of alimony is discretionary with the district court and is made after considering the factors of Iowa Code section 598.21A(1) which include,

> (a) The length of the marriage.
> (b) The age and physical and emotional health of the parties.
> (c) The distribution of property made pursuant to section 598.21.
> (d) The educational level of each party at the time of marriage and at the time the action is commenced.
> (e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities

> for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education to enable the party to find appropriate employment.
> (f) The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage and the length of time necessary to achieve this goal.
> (g) The tax consequences to each party.
> (h) Any mutual agreement made by the parties concerning financial or service contribution by one party with the expectations of future reciprocation or compensation by the other party.
> (I) The provisions of an antenuptial agreement.
> (j) Other factors the court may determine to be relevant in an individual case.

This is a fifteen-year marriage that both parties leave at an age when they yet are capable of self-support and in relatively good health. Julianne is leaving the marriage with nearly $300,000 in assets. The district court did not abuse its discretion in the award of alimony.

EXPERT WITNESS FEES. Julianne contends the district court abused its discretion when it failed to order Gary to pay her expert witness fees. She requested $17,050 in fees that were generated at her request to analyze Gary's financial information after the court determined the premarital agreement was a valid contract. The district court believed this was not necessary and contributed nothing to the determination of spousal support. It therefore denied the request. The court ordered Gary to pay $30,000 to Julianne for attorney fees. We find no abuse of discretion. We award no appellate attorney fees.

AFFIRMED.