IN THE COURT OF APPEALS OF IOWA

No. 8-701 / 07-0563
Filed January 22, 2009

IN RE THE MARRIAGE OF VERGESTENE COOPER AND BERNARD COOPER

Upon the Petition of
VERGESTENE COOPER,
Petitioner-Appellee,

And Concerning
BERNARD COOPER,
Respondent-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler (temporary support order) and Jon Fister (final decree), Judges.

Respondent appeals from the district court's rulings ordering temporary support payments and from the final decree contending a postnuptial agreement should not have been considered. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Sara Kersenbrock of Kersenbrock Law Office, Waterloo, for appellant.

Gary J. Boveia of Boveia Law Firm, Waverly, for appellee.

Heard by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

Bernard Cooper appeals from the decree dissolving his twenty-five year marriage to Vergestene Cooper. He contends the district court erred in (1) fixing temporary support and attorney fees, and (2) considering in crafting the financial provisions of the final decree, an alleged reconciliation agreement signed June 26, 2000, whereby Bernard agreed to certain things in the event there was a separation or divorce. We affirm in part, reverse in part, and remand.

SCOPE OF REVIEW. Our review of allowances for support and property division is de novo. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). The validity and construction of the reconciliation agreement is an equitable matter subject to de novo review. *See In re Marriage of Shanks*, ___N.W.2d ____, ___ (Iowa 2008). In making a de novo review we examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995). We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses, because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. Iowa R. App. P. 6.14(6)(*g*); *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992); *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998).

TEMPORARY SUPPORT AND ATTORNEY FEES. Bernard contends the district court erred in fixing temporary support and attorney fees. Vergestene contends that his appeal on this issue was not timely.

Iowa Code section 598.10 (Supp. 2005) provides for the entry of temporary orders in dissolution proceedings, including orders for financial assistance such as support and maintenance and attorney fees, and orders regarding the temporary custody of any minor child affected by the action.

Temporary orders involving financial assistance in dissolution cases are final judgments which are appealable as a matter of right pursuant to Iowa Rule of Appellate Procedure 6.1(1), and must be appealed within thirty days from the district court decision in order to preserve the right to contest the award of assistance. *In re Marriage of Denly*, 590 N.W.2d 48, 50 (Iowa 1999); *see In re Marriage of Winegard*, 257 N.W.2d 609, 614 (Iowa 1977).

Bernard sought discretionary review of this order from the supreme court of Iowa. The supreme court, in a single justice order, noted that temporary support orders are appealable as a matter of right and treated Bernard's application as a notice of appeal. The case was docketed as Supreme Court No. 06-0304. On November 14, 2006, the Clerk of the Iowa Supreme Court issued procedendo in 06-0304 finding that the appeal from the district court in the case was dismissed by Bernard on November 13, 2006, and the clerk of the Iowa District Court for Black Hawk County should proceed as if there had been no appeal. The appeal of 06-0304,[1] having been dismissed, the issues of temporary support and attorney fees are not before us and we do not address them.

RECONCILIATION AGREEMENT. In late May of 2000, Bernard and Vergestene allegedly signed an agreement that began:

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[1] Furthermore, 06-0304 was never transferred to us.

> I, Bernard Cooper, on this day, Monday, May 29, 2000, agree that if any of my indiscretions lead to and/or are the cause of a separation or divorce between me and my wife, Vergestene Cooper, that I will accept full responsibilities of [sic] my action. By doing so I agree that I will do the following:

There followed certain agreed provisions for division of property, support, and attorney fees.

The agreement allegedly was made after Vergestene learned that Bernard had established a relationship with another woman. Bernard contends either he did not sign the agreement or does not remember signing it. The district court did not find his testimony on this issue credible nor on our de novo review do we, and we affirm this finding. The district court in the final decree also specifically found:

> [T]he parties' reconciliation agreement was entered into voluntarily by Respondent, that its terms were not unconscionable at the time, that the marital relationship had deteriorated at least to the brink of an indefinite separation or suit for divorce, that Petitioner has acted in good faith, that changed circumstances do not render enforcement of the agreement inequitable, that it was not procured through fraud, mistake, or undue influence, and that Respondent's indiscretions caused the dissolution.
>
> Accordingly, the court will divide the parties' assets and debts addressed by the agreement according to its terms and make equitable distribution of any property or debts not addressed by the agreement.

Bernard contends that this was error in that the agreement is ambiguous and unenforceable. He further argues (1) that the term "indiscretions" is not clearly defined, (2) the agreement is triggered by his fault and Iowa is a no fault state and fault is not a proper consideration for the court, and (3) the triggering event of the reconciliation agreement did not occur.

Vergestene contends the agreement is enforceable in that (1) it is not against public policy to recognize the agreement, (2) the condition precedent to the agreement coming into force did occur, and (3) the agreement was not ambiguous and is enforceable. She cites no Iowa case or cases addressing the enforcement of a reconciliation agreement.

The question of what consideration, if any, should be given to a reconciliation agreement was addressed in Iowa in *Miller v. Miller*, 78 Iowa 177, 35 N.W. 464 (1887). There, a wife sued her husband seeking to enforce their written contract which provided:

> This agreement, made this fifth day of August, 1885, between the undersigned, husband and wife, in the interests of peace and for the best interests of each other and of their family, is signed in good faith by each party, with the promise each to the other and to their children that they will each honestly promise to help each other to observe and keep the same, which is as follows, to-wit: All past causes and subjects of dispute, disagreement, and complaint of whatever character or kind shall be absolutely ignored and buried, and no allusion thereto by word or talk to each other or anyone else shall ever be made. Each party agrees to refrain from scolding, fault-finding, and anger in so far as relates to the future, and to use every means within their power to promote peace and harmony, and that each shall behave respectfully and fairly treat each other; that Mrs. Miller shall keep her home and family in a comfortable and reasonably good condition, and Mr. Miller shall provide for the necessary expenses of the family, and shall, in addition thereto, pay Mrs. Miller for her individual use two hundred dollars per year, payable sixteen and two-thirds dollars per month, in advance, so long as Mrs. Miller shall faithfully observe the terms and conditions of their contract. They agree to live together as husband and wife and observe faithfully the marriage relation, and each to live virtuously with the other.

Miller, 78 Iowa at 178-79, 35 N.W. at 464. Mrs. Miller's petition set out several reasons and inducements for making the contract. *Id.* at 179, 35 N.W. at 464. Among other things, it averred that her husband while improperly spending

money upon other women, refused to furnish her with necessary clothing, and she had been compelled to furnish it herself by her personal earnings. *Id.* Mr. Miller demurred upon the ground that the contract was without consideration and against public policy. *Id.* His position was that his wife merely agreed to do what by law she was bound to do. *Id.* The majority of the supreme court on initial submission thought that the husband's position should be sustained and the judgment was affirmed. *Id.* On rehearing, a majority of the members of the court were newly appointed and they, without addressing the issue of consideration, held the enforcement of the contract was against public policy. *Miller v. Miller*, 78 Iowa 177, 179, 184, 42 N.W. 641, 641, 643 (1889).

The court found in contracting the wife agreed to do just what was demanded by her marital relations and that was essential to domestic felicity. *Id.* at 181, 42 N.W. at 642. While noting that Mr. Miller had been guilty of such conduct as to justify his wife leaving him and it was because of the contract that she consented to live with him, the court determined that judicial inquiry into matters of domestic discord would be fraught with irreparable mischief and was forbidden by sound considerations of public policy. *Id.* at 182, 42 N.W. at 642. Our courts have historically prohibited enforcement of contracts between husbands and wives that address marital issues. *See In re Straka's Estate*, 224 Iowa 109, 111, 275 N.W. 490, 491-92 (1937) (refusing to enforce a contract between husband and wife that provided compensation for the wife's domestic services because, among other things, the consideration for such agreements violates public policy); *Bohanan v. Maxwell*, 190 Iowa 1308, 1319, 181 N.W. 683,

684, 688 (1921) (finding an agreement where a woman promised to marry and take care of a man until his death in exchange for all of his property invalid as to services rendered after the marriage, because such agreements are contrary to public policy); *Heacock v. Heacock*, 108 Iowa 540, 542, 79 N.W. 353, 354 (1899) (stating that a "[h]usband and wife cannot contract with each other to secure the performance of their marital rights and duties"); *Grant v. Green*, 41 Iowa 88, 92 (1875) (denying enforcement of a contract providing compensation to a wife for caring for her disabled husband because, in part, it would not be in the best interest of society). This has held true even if the agreement was designed to remedy marital problems. One early case explains,

> Compensation for wrongs, under such circumstances, cannot be made in money. Their adjustment of differences must be conclusively presumed to have sprung from mutual affection, the interests of home and children, and their well-being in society, and not to have been induced by greed of worldly gain. *See Miller v. Miller*, 78 Iowa 177, 179, 35 N.W. 464, 464 (1887); *Miller v. Miller*, 78 Iowa 177, 182, 42 N.W. 641, 642 (1889). Public policy forbids such inquiries, and the sacredness of the relation demands that conjugal consortium be kept without the domain of bargain and sale.

Fisher v. Koontz, 110 Iowa 498, 504, 80 N.W. 551, 553 (1899). Early legislation, though enlarging married women's rights, did not alter marital responsibilities spouses owed one another. *See Bohanan*, 190 Iowa 1308, 1315, 181 N.W. 683, 686 (providing that statutes addressing married women's rights "do not deprive the husband of the wife's ordinary services as wife or permit her to demand or receive compensation therefor from him").

The position that the courts should not inquire into matters of domestic discord was affirmed by the Iowa legislature when, in 1970, it erased any

consideration of fault in dissolution matters. *In re Marriage of Goodwin*, 606 N.W.2d 315, 324 (Iowa 2000). At the same time it began delineating factors to be considered in dissolving a marriage which are specified in Iowa Code section 598.21(5). This section provides in relevant part that "[t]he court shall divide all property . . . equitably between the parties after considering *all of the following:*." Iowa Code § 598.21(5) (emphasis supplied). There follows a number of enumerated factors none of which provides for the consideration of a reconciliation agreement.

We recognize there could be some argument that a reconciliation agreement could be considered under two factors, specifically

> (k) Any written agreement made by the parties concerning property distribution.
> . . . .
> [and]
> (m) Other factors the court may determine to be relevant in an individual case.

Iowa Code § 598.21(5)(k)(m). In addition, reconciliation agreements are enforceable according to some legal treatises.

> There is no reason why an agreement to resume marital relations where one of the parties has just cause for divorce should not be sustained, and it is generally held that a promise made in consideration of such resumption and of the dismissal or forbearance to bring justified proceedings for divorce, or in compromise of legal proceedings for non-support, is binding, unless its provisions violate public policy in some other manner. These so-called reconciliation agreements have become quite common, courts often applying the same rules to them as to premarital or antenuptial agreements.

7 *Williston on Contracts* § 16:20, at 460-62 (4th ed. 1997). Furthermore, courts from other states have enforced reconciliation agreements under similar but distinguishable facts from what we have here.[2]

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[2] In *Flansburg v. Flansburg*, 581 N.E.2d 430, 437 (Ind. Ct. App. 1991), the Indiana Court of Appeals enforced, over a wife's objection, a postnuptial agreement that made certain financial provisions in the event of a divorce or dissolution. The court held the agreement could be enforced as long as it "is entered into freely and without fraud or misrepresentation or is not otherwise unconscionable." *Flansburg*, 581 N.E.2d at 437. Unlike the situation here, the *Flansburg* agreement was entered into by parties having full disclosure and independent legal representation. *See id.* at 433. The wife had filed an action for dissolution after about three years of marriage. *Id.* at 431. Three months into the pendency of the dissolution action the parties, each represented by an attorney of his or her own choosing, executed the postnuptial agreement and the dissolution was dismissed. *Id.* at 432-33. Before signing the agreement, it was delivered to the wife's attorney and the attorney and client had time to review it. *Id.* at 435. Furthermore, the wife and her attorney, in advance of its signing, were provided with accurate and complete financial information as to the husband's property. *Id.* When a second dissolution was filed the husband sought enforcement of the agreement. *Id.* at 432-33. The court found, in reliance on the agreement, the husband expended at least $64,000 for the benefit of the wife and her family, and found this provided ample consideration for the agreement. *Id.* at 434. The dissent suggests that the agreement was not validated by an Indiana statute. *Id.* at 437 (Garrard, J., dissenting).

In *Crawford v. Crawford*, 392 S.E.2d 675, 676 (S.C. Ct. App. 1990), the South Carolina Court of Appeals addressed the issue of the enforcement in a divorce of a prior property settlement and a reconciliation agreement entered into when the parties decided to reconcile and dismiss a previous dissolution action. The parties then lived together for three years following the signing of the agreement. *Crawford*, 392 S.E.2d at 677. In the divorce the trial court had divided the property in existence at the time of the agreement in accordance with the agreement and had made a separate allocation of after acquired property. *Id.* at 677-78. The court held, "the property settlement agreement and reconciliation agreement preclude reapportionment of the property covered by them except to the extent such property has increased in value due to the joint efforts of the parties." *Id.* at 678-79.

In *Laudig v. Laudig*, 624 A.2d 651, 652-53 (Pa. Super. Ct. 1993), the Superior Court of Pennsylvania, in addressing an appeal from an order of the Court of Common Pleas, found the lower court had committed no error at law or abuse of discretion in holding a postnuptial agreement barred a wife's right to additional marital assets in a divorce proceeding. The wife earlier was involved in an extramarital relationship and the parties separated. *Laudig*, 624 A.2d at 652. The husband informed her he was contemplating divorcing her and, while they reconciled, the reconciliation was in conjunction with an agreement that limited her marital property rights in the event she had another extramarital affair. *Id.* The agreement was negotiated in the presence of the wife's attorney. *Id.* The wife subsequently resumed her relationship with her former paramour and the husband filed for divorce. *Id.*

However, after considering *Miller v. Miller*, 78 Iowa 177, 42 N.W. 641 (1889), and the statutory factors the legislature has provided for dividing property, all of which exclude a fault component, we find the agreement in violation of the public policy of this state in that it is triggered on a finding of fault.[3] We therefore reverse and remand the case to the district court to exclude any consideration of the reconciliation agreement and to reevaluate the equity of the property division. We affirm in part, reverse in part, and remand.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

In *Whalen v. Whalen*, 581 S.W.2d 578, 579 (Ky. Ct. App. 1979), the Court of Appeals addressed and affirmed a trial court's enforcement of an agreement providing for distribution of property in the event a reconciliation failed. The husband who appealed had stated he was aware of the contents of the agreement and under no disability during the negotiation or at the time of execution. *Whalen*, 581 S.W.2d at 579. The court, while noting that these types of agreements should be closely scrutinized for overreaching by either party, found no impropriety, found the agreement valid and enforceable, and not contrary to public policy. *See id.* 580-81.

[3] If reconciliation agreements are to be considered under section 598.21(5) in a dissolution, the legislature can so provide.