

IN THE COURT OF APPEALS OF IOWA

No. 8-801 / 08-0736
Filed October 29, 2008

**IN RE THE MARRIAGE OF BRIAN JAMES GALL
AND REBECCA KAY GALL**

**Upon the Petition of
BRIAN JAMES GALL,**
Petitioner-Appellee,

**And Concerning
REBECCA KAY GALL,**
Respondent-Appellant.

Appeal from the Iowa District Court for Grundy County, Todd A. Geer,
Judge.

Rebecca Gall appeals from economic provisions of the parties' dissolution
decree. **AFFIRMED.**

Barry S. Kaplan and Melissa A. Nine of Kaplan & Frese, L.L.P.,
Marshalltown, for appellant.

Reyne L. See of Johnson, Sudenga, Latham, Peglow & O'Hare, P.L.C.,
Marshalltown, for appellee.

Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

DOYLE, J.

Rebecca Gall appeals from economic provisions of the parties' dissolution decree. She contends the trial court erred in (1) awarding Brian Gall his Roth IRA and (2) failing to divide Brian's Alliant 401(k) account between the parties. We affirm.

I. Background Facts and Proceedings.

Brian and Rebecca were married on November 29, 1997. This was the second marriage for Rebecca. Her first husband was killed in an industrial accident. As a result of his death, Rebecca received proceeds, which she invested.

The parties entered into an antenuptial agreement on November 26, 1997.

The relevant portions read:

(2) That all of the properties of any kind or nature, real, personal or mixed, wherever the same may be found which belong to Brian or in which he has an interest before marriage and all properties which he, on his own account, may at any time hereafter acquire, shall be and remain forever his separate and personal estate, free from any claim of dower, including, without limitation, all proceeds, from the sale of such properties and all interest, dividends, rents, and profits which may in time accrue or result in any manner from such properties. This specifically includes any inheritance or pension Brian may receive. This paragraph does not apply to the residence now jointly owned by the parties which is discussed in paragraph 6.¹

Paragraph three of the agreement provides in part:

[A]nd both parties agree and consent that, the other may dispose of, by sale, lease, gift, bequest, devise or otherwise, all or any portion of his or her property owned immediately prior to the marriage or acquired at any time thereafter, without the consent of

¹ Paragraph one of the agreement contains the same provisions pertaining to Rebecca's rights to her present and future property.

the other and to all intents and purposes as if they both had remained single and unmarried.

In paragraph five, the parties further agreed:

[T]hat nothing in this Agreement shall be construed to be a bar to either party specifically giving any property of which he or she may be seized or possessed to the other party by will, gift or otherwise.

Lastly, paragraph seven of the agreement provides in part:

This contract is intended to provide for a division of property in the event of a dissolution of their marriage and, to that end, the parties agree that the Court granting the dissolution of their marriage strictly adhere to and enforce the division of property between the parties as agreed to in this document.

In July 1996 Rebecca received the settlement proceeds resulting from her first husband's death. She apparently invested the money in securities. In 2000, upon the advice of her CPA, Rebecca used the securities to fund a Roth IRA in Brian's name only. This was done as a "tax maneuver" to avoid paying additional tax.

Prior to trial, the parties resolved all property issues except for a determination as to whether Brian was entitled to retain as his sole property the \$11,000 Roth IRA and whether he was entitled to receive as his sole property his Alliant pension and 401(k) account. After trial, the trial court found:

It is not disputed that [Rebecca] used money from her separate funds in order to establish [Brian's] Roth IRA. The Roth IRA is in [Brian's] name alone. There were no conditions or exceptions to ownership established when the title to those funds was transferred to [Brian] from [Rebecca].

The court additionally found that

the clear intent of the antenuptial agreement was to allow the parties to retain as their sole property any amounts they held in their own name prior to marriage and any amounts they accumulated in their own name after marriage. This specifically

includes retirement accounts (although the antenuptial agreement simply refers to such accounts as “pensions”).

The court awarded Brian his entire interest in the Roth IRA and all pensions and retirement accounts, including the Alliant 401(k) account, currently held in his own name.

II. Scope of Review.

In this equity case our review is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(g). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

III. Antenuptial Agreement.

Antenuptial agreements are to be construed liberally to carry out the parties' intent. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 96 (Iowa Ct. App. 1997). They are to be construed in the same manner as ordinary contracts. *Id.* Where, as here, the dispute centers on determining the legal effect of contractual terms, we engage in the process of construction, rather than interpretation. See *Fausel v. JRJ Enters.*, 603 N.W.2d 612, 618 (Iowa 1999). “In the construction of written contracts, the cardinal principle is that the intent of the parties must control; and except in cases of ambiguity, this is determined by what the contract itself says.” Iowa R. App. P. 6.14(6)(n).

The parties entered into the antenuptial agreement shortly before their marriage. It had been prepared by an attorney at Rebecca's request. Brian waived his right to have a lawyer review the agreement.

IV. Brian's Roth IRA.

Rebecca argues the trial court should have awarded her Brian's Roth IRA, asserting it was funded with her money. She focuses her argument on paragraph 1 of the agreement emphasizing that property that belongs to Rebecca on her own account "shall be and remain forever her separate and personal estate." She argues that the monies that funded the Roth IRA came from proceeds she received as a result of the death of her first husband, that she never gifted them to Brian, and that therefore she was entitled to the Roth IRA.

Rebecca transferred the monies to the Roth IRA in Brian's name only upon the advice of her CPA. This was done as a "tax maneuver" to reduce her tax liability. In filing her tax returns, she represented under penalty of perjury to the Internal Revenue Service, an official agency of the United States government, that the Roth IRA was Brian's, not hers. As a result of employing this tax maneuver, Rebecca's tax liability was indeed reduced. Rebecca then asserts to the courts that the IRA was hers, not Brian's. She cannot have it both ways.²

² The movie *Miracle on 34th Street* comes to mind:

Fred Gailey: Your Honor, every one of these letters is addressed to Santa Claus. The Post Office has delivered them. Therefore the Post Office Department, a branch of the Federal Government, recognizes this man Kris Kringle to be the one and only Santa Claus.

Judge Henry X. Harper: Uh, since the United States Government declares this man to be Santa Claus, this court will not dispute it. Case dismissed.

Miracle on 34th Street (Twentieth Century Fox Film Corp. 1947).

Rebecca transferred her interest in the assets when she placed them in the IRA in Brian's name only. Her reason for the transfer is irrelevant to our analysis. Paragraph 5 of the antenuptial agreement provides that it is not to be construed "to be a bar to either party specifically giving *any* property of which he or she may be seized or possessed to the other party by will, gift *or otherwise*." (Emphasis added.) It is not necessary for us to determine if Rebecca gifted the monies to Brian. The agreement allows either party to give assets to the other by will, gift, or otherwise. Rebecca transferred the monies to Brian by depositing them in a Roth IRA in Brian's name only. There were no conditions attached to the transfer. She represented to a government agency that the monies were Brian's. The ownership of the parties' separate property is discernable by the names in which the property is held at the time of the dissolution of marriage.

We affirm the trial court on this issue.

V. Brian's Alliant 401(k) Account.

Rebecca argues that she is entitled to a portion of Brian's Alliant 401(k) account. Brian began working for Alliant in 2001 and through his employment contributed to a 401(k) retirement account. Rebecca focuses on paragraph 2 of the antenuptial agreement which provides, in part, that Brian's property shall remain his, including "any inheritance or pension Brian may receive." She argues that since the agreement only mentions "pensions", not 401(k)s, that Brian's Alliant 401(k) account is not subject to the agreement and she is therefore entitled to a portion thereof.

Without specifically so stating, it appears Rebecca is asking this court to employ the maxim of *expressio unius est exclusion alterius*. See *RPC*

Liquidation v. Iowa Dep't of Transp., 717 N.W.2d 317, 324 (Iowa 2006) (recognizing that the rule *expressio unius est exclusio alterius* applies in the construction of contracts); see also Black's Law Dictionary 620 (8th ed. 2004) (defining *expressio unius est exclusio alterius* as "a canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative"). Rebecca's argument ignores the fact that the preceding language in paragraph 2 of the agreement covers "all" of Brian's property in which he, on his own account, may acquire at any time after the parties married. We construe a contract in its entirety by considering all of its pertinent provisions. *RPC Liquidation*, 717 N.W.2d at 324. There is no indication that paragraph 2 of the agreement was meant to exclude 401(k)s acquired by Brian after the marriage.

Rebecca's other arguments of abandonment and public policy are deemed waived. This court does not consider issues raised for the first time on appeal. *Meir v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). In any event, we find no merit in the arguments.

We affirm the trial court on this issue.

VI. Appellate Attorney Fees.

Brian seeks an award of appellate attorney fees. We consider the needs of the party making the request, the ability of the other party to pay, and whether the party seeking the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Cooper*, 524 N.W.2d 204, 207 (Iowa Ct. App. 1994). Considering these factors, we award Brian \$1000 in appellate attorney fees.

VII. Conclusion.

We determine Rebecca has no interest in Brian's Roth IRA or his Alliant 401(k) account pursuant to the terms of the antenuptial agreement. We therefore affirm the decree dissolving the parties' marriage and award Brian \$1000 in appellate attorney fees.

AFFIRMED.