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DISTRICT II

August 30, 2023

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You are hereby notified that the Court has entered the following opinion and order:

2022AP359

In re the marriage of: Lisa Muzaffar Kusko v. Kamal Syed
Muzaffar (L.C. #2019FA319)

Before Neubauer, Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kamal Syed Muzaffar appeals a divorce judgment and an order denying his motion for reconsideration. He argues the circuit court erred by invalidating the parties' prenuptial marital property agreement (MPA). Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ Because the circuit court properly exercised its discretion in determining the MPA was substantively unfair at the time of divorce, we affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Lisa Muzaffar Kusko and Kamal were married on February 7, 2004. The day before their wedding, Kamal and Lisa entered into an MPA. At the time of their marriage, Kamal was a practicing family doctor who owned a medical clinic in Elkhorn, Wisconsin. Lisa lived in Pennsylvania and, after the wedding, moved to Wisconsin. In 2012, the couple had twin children.

Lisa petitioned for divorce in 2019. She moved to invalidate the MPA, arguing that the MPA was inequitable, that she did not voluntarily enter into the MPA, and that she and Kamal had disregarded the MPA during their marriage. Following a two and one-half day trial, the circuit court invalidated the MPA on the basis that, at the time of divorce, circumstances had changed, and the MPA was no longer fair or equitable.

An MPA is considered “equitable” and therefore enforceable when all three of the following requirements are met: (1) each spouse has made a fair and reasonable disclosure of his or her financial status to the other spouse; (2) “each spouse has entered into the agreement voluntarily and freely”; and (3) “the substantive provisions of the agreement dividing the property upon divorce are fair to each spouse.” *Button v. Button*, 131 Wis.2d 84, 89, 388 N.W.2d 546 (1986). As to the third requirement, the MPA must be substantively fair both at the time of its execution and, if circumstances significantly change after execution of the agreement, at the time of divorce. *Id.* When determining whether an MPA is substantively unfair at the time of divorce, the question is whether the parties were able to reasonably predict events such that the circumstances at the time of divorce are within a range of circumstances anticipated by the parties at the time they entered into the MPA. *See Warren v. Warren*, 147 Wis. 2d 704, 710, 433 N.W.2d 295 (Ct. App. 1988). We review a circuit court’s decision as to the enforceability of an MPA for an erroneous exercise of discretion. *See Button*, 131 Wis. 2d at 99.

Here, the circuit court relied on a variety of reasons in support of its determination that the MPA was substantively unfair at the time of divorce. It first observed that, at execution, Kamal wanted the MPA to protect his medical practice, and the parties believed Kamal was going to be a business owner and expand and run his medical practice. At that time, Kamal was making \$40,000 per year. Although the medical practice did initially expand as the parties anticipated, Kamal testified the clinic is currently operating at a loss, and he is instead primarily a hospital employee, making \$19,800 per month. The circuit court determined Kamal's significant increase in hospital salary and hospital-work focus were not foreseeable at the time the MPA was executed.

The circuit court also found that since the execution of the MPA, Lisa had not had the same opportunity to protect her financial assets as Kamal. The court observed that Kamal was able to protect his main asset in the MPA, his medical clinic, but Lisa's main asset in the MPA was her house in Pennsylvania, which she later sold to move to Wisconsin, and the proceeds from the sale of her house were gone. The court also noted that when the couple decided to live in Wisconsin, Lisa commenced a job and accumulated a retirement account that did not exist at the time of the MPA's execution and would therefore be subject to division.

The circuit court then emphasized that since executing the MPA, the couple had twins, and Lisa provided some childcare for their children. The court found Lisa's childcare responsibilities caused her "to at least reduce to some extent the income that she earned and her financial status during the course of the marriage," which was different from the parties' expectations at the time of the MPA's execution.

Finally, the circuit court found that “the parties just didn’t abide by this agreement.” Kamal and Lisa were supposed to create a joint bank account that they would both put money into for household expenses, and that did not happen. The court determined it would be unfair to enforce the MPA when the parties did not abide by it during the marriage. Kamal appeals.

On appeal, Kamal first argues the circuit court’s factual findings are not supported by the Record. As one example, Kamal asserts no one testified it was unforeseeable that he would change jobs or that his salary would increase during the marriage. As another example, Kamal contends the “court’s findings regarding the clinic’s value and the impact of having children on Lisa’s income are unsupported by the record.” He also argues the circuit court’s determination that the parties did not follow the MPA by immediately creating a joint account for household expenses is not supported by the Record. Kamal’s arguments, however, overlook that it is the function of the circuit court, as factfinder, “to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *State v. Poellinger*, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990).

Here, the circuit court’s factual findings are supported by the Record. The facts from trial establish that Kamal wanted the MPA to protect his medical practice, Kamal was making \$40,000 per year at the time the MPA was executed, Kamal anticipated that his medical practice would expand throughout the marriage, Kamal’s practice is currently operating at a loss, and Kamal instead receives significant compensation from his hospital work. The circuit court, as factfinder, was permitted to infer from these facts that Kamal’s hospital-work focus and significant increase in salary were not foreseeable at the time the MPA was executed. *See Poellinger*, 153 Wis. 2d at 506.

As for the circuit court’s determination that Lisa’s income was impacted by caring for the couple’s children, Lisa testified that before the couple had children she was an instructor at Gateway Technical College and did freelance work in the summer—either teaching or ghostwriting books. She also took on extra activities during the school year, such as teaching additional classes, to increase her pay. When the couple had children, Lisa did not take on freelance work during the summer or extra school year activities; instead, she provided childcare. The circuit court’s factual determination is supported by the Record.

Regarding Kamal’s clinic, Kamal emphasizes the circuit court found that his clinic was in a “much different place now than the parties were back then[,]” and he argues this determination is erroneous because the clinic’s value is similar to its value when the MPA was executed. However, the circuit court’s discussion regarding the clinic was in the alternative. After the court determined Kamal’s significant increase in hospital salary and his hospital-work focus were not reasonably foreseeable at the time the MPA was executed, the court also questioned the value of the clinic, noting “the clinic expanded to such a large extent that the business was able to buy [a] Porsche[,]” but “all of a sudden as we sit here at divorce, that’s no longer the case.” The court continued:

So once again, I don’t think [Kamal] gets to have it both ways, either the expectation was that the business would expand and I have to consider the current state of the business as an expansion which it isn’t or that wasn’t the case which in that event, the language located within the prenuptial agreement about an expansion really doesn’t make much sense.

The court did not invalidate the MPA simply because of the clinic’s value.

Kamal then argues the circuit court’s determination that the parties did not create a joint account until recently was clearly erroneous. The MPA provided that the couple would establish a joint account to pay for household expenses, and the court found:

The uncontroverted testimony is that that did not happen after the parties were married, at least up until recently or well after the marriage actually occurred. And it’s certainly the case that the parties agreed to do so and contracted to do so immediately upon inception.

After trial, Kamal moved for reconsideration on the basis that he had evidence that the joint account was created in October 2005. The circuit court denied the motion, noting in part that Kamal was “mischaracterizing the Court’s comments” because the court did not invalidate the MPA simply because Kamal and Lisa did not promptly create a joint account. Rather, the transcript reflects that “the parties did not follow the prenuptial agreement” and “didn’t use a bank account for the purposes and in the manner ... outlined in Section 12 of the” MPA.

The circuit court’s determination that the joint account was not created immediately after the parties were married or that the parties did not use the account as contemplated was not clearly erroneous. Even assuming the account was created in October 2005, this means that the parties ignored the MPA’s joint-account provision for at least twenty-one months after the MPA’s execution. Further, Kamal concedes in his brief that the parties did not use the joint account as contemplated by the MPA. He contends both parties used individual accounts to pay for expenses and cites in support Lisa’s trial testimony that Kamal made her “pay half the mortgage, even though his salary was like three times mine, I’d always have to pay half[.]”

Kamal next contends that, although the circuit court correctly found that Lisa’s retirement account was created after the MPA and is therefore subject to division, this fact should not

invalidate the MPA because the MPA only protected premarital assets. This argument overlooks that the circuit court did not invalidate the MPA because Lisa acquired an asset that was subject to division. Rather, the circuit court determined that, compared to Kamal, Lisa did not have the same opportunity to protect her individual assets as listed in the MPA because the couple decided to have Lisa move to Wisconsin after the MPA was executed.

Finally, Kamal argues the circuit court erred by invalidating the MPA. The circuit court's factual findings, however, establish that following the MPA's execution and at the time of divorce, the parties did not abide by the agreement, Kamal was not pursuing his medical practice and was instead making significantly more money working for the hospital, Lisa did not have the same opportunity to protect her assets because of the parties' decision to live in Wisconsin, and Lisa gave up income in order to provide childcare for the couple's children. Given these factual determinations, we cannot conclude the circuit court erroneously exercised its discretion by determining circumstances had changed in an unforeseeable way such that the MPA was now substantively unfair. *See Button*, 131 Wis. 2d at 99.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.
See WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals