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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

CAROLE ELAINE GONZALES, *Petitioner/Appellant*,

v.

STEVEN MEDINA GONZALES, *Respondent/Appellee*.

No. 1 CA-CV 15-0304 FC
FILED 5-3-2016

Appeal from the Superior Court in Maricopa County
Nos. FN2013-004143
FN2013-071311
(Consolidated)
The Honorable Kathleen H. Mead, Judge

AFFIRMED IN PART, VACATED AND REMANDED IN PART

COUNSEL

Cordrey Law Firm PLC, Phoenix
By Michael E. Cordrey
Counsel for Petitioner/Appellant

Lincoln & Wenk, PLLC, Goodyear
By Russell F. Wenk
Counsel for Respondent/Appellee

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MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Lawrence F. Winthrop joined.

K E S S L E R, Judge:

¶1 Carole Elaine Gonzales (“Wife”) challenges the family court’s ruling that an Antenuptial Agreement (“Agreement”) between herself and Steven Medina Gonzales (“Husband”) was valid and enforceable. She also challenges the trial court’s decision not to award her spousal maintenance, a share of Husband’s retirement benefits, or attorneys’ fees. For the reasons set forth below, we affirm on all issues except attorneys’ fees, on which we vacate and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Husband and Wife lived together for approximately seven years before getting married in 1997. They executed the Agreement prepared by Wife the day before their wedding. One term of the Agreement provides Husband’s retirement benefits from the Arizona State Retirement System (“ASRS”) would “remain the separate property and income of [Husband].” A second term provides “[e]ach party agrees to waive any spousal maintenance.”

¶3 Both spouses petitioned for dissolution of the marriage in September 2013. In the dissolution proceeding, Wife sought a share of Husband’s ASRS benefits, to remain the sole beneficiary of those benefits, and indefinite spousal maintenance of \$1,700 per month. Wife contended the Agreement’s provisions to the contrary were invalid because she signed the Agreement under duress and because it lacked “a listing of assets, liabilities, property, or other listing of information . . . which precluded Wife from making a voluntary and informed decision as to the nature of the [Agreement].”

¶4 After trial, the family court found the Agreement was enforceable, denied Wife’s claims, and declined to award attorneys’ fees to either party. Wife appealed from the family court’s order. We dismissed that appeal as premature. The family court later entered a final dissolution decree pursuant to Ariz. R. Fam. Law P. 81(A). Wife timely appealed. We

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have jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) section 12-2101(A)(1) (2016).

DISCUSSION

¶5 A premarital agreement is unenforceable if the spouse against whom enforcement is sought proves either of the following:

1. The person did not execute the agreement voluntarily.
2. The agreement was unconscionable when it was executed *and* before execution of the agreement that person:
 - (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.
 - (c) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

A.R.S. § 25-202(C) (2007) (emphasis added). It is Wife’s burden to show the Agreement was unenforceable. *See In re Marriage of Pownall*, 197 Ariz. 577, 580, ¶ 8 (App. 2000) (holding the spouse who seeks a declaration that a premarital agreement is unenforceable has the burden of proving the agreement is invalid). Determination of the enforceability of this kind of agreement is a question of law, which we review *de novo*. A.R.S. § 25-202(E); *Transp. Ins. Co. v. Bruining*, 186 Ariz. 224, 226 (1996) (holding that questions of law are reviewed *de novo*). However, we review the family court’s findings of fact for clear error. *McNutt v. McNutt*, 203 Ariz. 28, 30, ¶ 6 (App. 2002).

I. Wife Voluntarily Signed the Agreement.

¶6 Wife first argues the Agreement is invalid under A.R.S. § 25-202(C)(1) because she signed it under duress. To constitute duress, an act or threat must be wrongful and must induce such fear as to preclude the exercise of free will and judgment. *USLife Title Co. v. Gutkin*, 152 Ariz. 349,

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357 (App. 1986) (citations omitted); Restatement (Second) of Contracts § 175 cmt. b (1981).

¶7 The family court did not err in holding Wife failed to show that she acted under duress. Wife did not show that Husband acted wrongfully or that she was deprived of her free will and judgment. While Wife testified she felt pressured to sign the Agreement because Husband “would not get married without it,” she also conceded her alleged “duress” was merely embarrassment she would have felt had the wedding not gone forward as planned. Further, Wife testified she typed up the Agreement. While Wife may have felt pressure, the family court acted within its discretion in finding such feelings did not deprive her of her free will and judgment. *See Valento v. Valento*, 225 Ariz. 477, 481, ¶ 11 (App. 2010) (Court of Appeals will not disturb the family court’s factual determinations unless they are clearly erroneous).

II. Wife Presented No Evidence Showing the Agreement Was Unconscionable.

¶8 Wife also contends the Agreement is invalid under A.R.S. § 25-202(C)(2) because it did not contain a “fair or reasonable disclosure of the property or financial obligations of the parties.” The Agreement does not contain any financial disclosures, but A.R.S. § 25-202(C)(2) also requires a showing that the agreement “was unconscionable when it was executed.”

¶9 There are two types of unconscionability: procedural and substantive. Procedural unconscionability typically involves unfair surprise or things that prevented bargaining from proceeding as it should. *Maxwell v. Fidelity Fin. Services, Inc.*, 184 Ariz. 82, 88-89 (1995) (citations omitted). This type of unconscionability often resembles fraud or duress. *Id.* at 89. We addressed Wife’s duress argument above. *See supra* ¶¶ 6-7.

¶10 Substantive unconscionability exists if, for example, the contract terms are so one-sided as to be overly oppressive or unduly harsh to one of the parties. *Clark v. Renaissance West, L.L.C.*, 232 Ariz. 510, 512, ¶ 8 (App. 2013). We determine whether the Agreement was unconscionable *de novo*, but will defer to the family court’s factual findings. A.R.S. § 25-202(E); *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 252, ¶ 40 (App. 2005).

¶11 Wife presented no evidence of substantive unconscionability. Indeed, Wife included the following language in the Agreement:

Each of the parties have given full and mature thought to the making of this Agreement. . . . Both parties fully understand

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all of the provisions of this instrument and believe them to be fair, just, adequate, reasonable and consonant with the best interests of each of them and accordingly accept such provisions freely and voluntarily, and not as a result of any fraud, duress or undue influence.

Wife also acknowledged she prepared the Agreement within a few days of its execution. It was within the family court's discretion to conclude that the Agreement Wife prepared did not become unconscionable in those few days between preparation and execution. *Cf. In re Estate of Henry*, 6 Ariz. App. 183, 186 (1967) ("In this jurisdiction a person who is competent is held as a matter of law to know the contents of an agreement he signs.") (citation omitted). Wife also failed to present evidence showing any of the Agreement's terms were oppressive or unduly harsh when she signed the Agreement.

¶12 Wife next argues she "had no opportunity to be advised by Counsel, and that she did not have any advice of Counsel prior to signing the [Agreement]." The Agreement states "each party acknowledges that they have had adequate opportunity to receive legal advice on the effect of this Agreement." Even if we were to set that language aside, premarital agreements do not become unconscionable simply because a spouse did not consult counsel. *See id.* at 186.

¶13 Because Wife did not carry her burden to establish unenforceability, we affirm the family court's ruling that the Agreement was valid and enforceable under A.R.S. § 25-202(C). Because the plain language of the Agreement precluded Wife's claims for a share of Husband's ASRS benefits and for spousal maintenance under A.R.S. § 25-319 (2007), we need not reach Wife's additional arguments regarding those two issues.

III. Wife Was Not Entitled to Spousal Maintenance under A.R.S. § 25-202(D).

¶14 Wife next contends she was entitled to spousal maintenance under A.R.S. § 25-202(D), which states as follows:

If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, *may* require the other party to

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provide support to the extent necessary to avoid that eligibility.

A.R.S. § 25-202(D) (emphasis added). Wife testified she applied for Arizona Health Care Cost Containment System, Supplemental Security Income (“SSI”), and Social Security Disability (“SSD”), that her applications were denied, and that she was pursuing an appeal at least as to SSD. The court also considered Wife’s testimony that she received food stamps. This evidence does not establish Wife was “eligible for support . . . at the time of separation or marital dissolution.” *Id.*

¶15 Moreover, even assuming Wife established eligibility, the family court has discretion whether to require Husband to provide support under A.R.S. § 25-202(D). See *City of Chandler v. Arizona Dep’t. of Transp.*, 216 Ariz. 435, 438, ¶ 10 (App. 2007) (use of “may” in a statute “generally indicates permissive intent”) (quoting *Walter v. Wilkinson*, 198 Ariz. 431, 432, ¶ 7 (App. 2000)). We see no abuse of that discretion on the record before us.

IV. The Family Court Abused Its Discretion in Declining to Award Attorneys’ Fees to Wife’s *Pro Bono* Counsel.

¶16 Finally, Wife contends the family court erred when it declined to award her attorneys’ fees and costs. We will not disturb the family court’s decision absent an abuse of discretion. *MacMillan v. Schwartz*, 226 Ariz. 584, 592, ¶ 36 (App. 2011).

¶17 Arizona Revised Statutes section 25-324(A) (Supp. 2015) authorizes an award of attorneys’ fees and costs upon considering “the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings.” It does not appear the family court considered these factors; it instead declined to award attorneys’ fees solely because Wife was represented *pro bono*.

¶18 *Pro bono* counsel can recover attorneys’ fees under A.R.S. § 25-324(A). *Thompson v. Corry*, 231 Ariz. 161, 163-64, ¶¶ 6-8 (App. 2012). We therefore remand to the family court to determine whether Wife is entitled to recover attorneys’ fees and costs under A.R.S. § 25-324(A) and, if so, a reasonable amount of recovery. See *In re Marriage of Williams*, 219 Ariz. 546, 548, ¶ 8 (App. 2008) (an abuse of discretion occurs if the family court commits an error of law in reaching its decision under A.R.S. § 25-324).

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CONCLUSION

¶19 We affirm the family court's decree except for its decision declining to award Wife attorneys' fees and costs, which we vacate and remand for further proceedings. Both parties request an award of attorneys' fees and costs on appeal. We have examined the record regarding both parties' financial resources and the reasonableness of their positions. A.R.S. § 25-324(A). In the exercise of our discretion, we decline to award attorneys' fees or costs to either party on appeal. *Leathers v. Leathers*, 216 Ariz. 374, 379, ¶ 22 (App. 2007).



Ruth A. Willingham · Clerk of the Court
FILED : ama