

2014 IL App (2d) 130643-U
No. 2-13-0643
Order filed March 12, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

In re MARRIAGE OF, MICHAEL J. AURIEMMA,)	Appeal from the Circuit Court of Du Page County.
)	
Petitioner/Counter-Respondent- Appellant,)	
)	
and)	No. 12-D-2361
)	
SANDRA AURIEMMA,)	
)	Honorable
Respondent/Counter-Petitioner- Appellee.)	Linda E. Davenport, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Burke and Justice Zenoff concurred in the judgment.

ORDER

- ¶ 1 *Held:* The parties' postmarital agreement was unconscionable. The trial court therefore properly determined that the agreement was unenforceable.
- ¶ 2 The petitioner/counter-respondent, Michael Auriemma, appeals from the April 29, 2013, order of the circuit court of Du Page County determining that the postmarital agreement that he had entered into with the respondent/counter-petitioner, Sandra Auriemma, was invalid. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 The parties were married on May 27, 1988. At that time, Sandra was 18 and Michael was 19. Three children were born to the parties during the marriage: Michael, born September 1, 1988; Nicholas, born February 8, 1991; and Tessa, born November 24, 1992. On October 2, 2003, Sandra filed a petition for dissolution of marriage. On that same day, she filed a petition for a temporary restraining order, seeking to prevent Michael from squandering certain marital assets. In those petitions, she asserted that she worked for the Oak Brook Park District and earned approximately \$20,000 per year. She asserted that Michael worked at Illinois Mortgage Company and earned over \$300,000 per year. She further claimed that during the marriage, the parties had acquired substantial savings and assets, including checking and savings accounts at MB Financial Bank, US Bank, Charter One, and First National Bank of Elmhurst; a marital residence in Bensenville; commercial real estate; automobiles (including a 2000 Dodge Durango; a 1998 BMW 5 Series, and a Mercedes S Class); Michael's retirement plan; a business known as Shoreline Autos; a business known as Illinois Mortgage Company; and a 21 foot Centurion power boat. Sandra requested child support and maintenance of over \$10,000 a month.

¶ 5 On April 23, 2004, the trial court granted Sandra's motion to voluntarily dismiss her petition for dissolution of marriage.

¶ 6 On August 18, 2004, the parties entered into a post-nuptial agreement (PNA). The PNA indicated that Sandra had filed a petition for dissolution which remained pending and undetermined.¹ The PNA further indicated that "both parties consider it to be in their

¹ This statement in the PNA was written either before April 23, 2004, or is incorrect. The record does not indicate that Sandra filed another petition for dissolution of marriage in 2004

respective best interests to settle by and between themselves the issues of the respective rights of property growing out of the marital relationship.” The PNA also included these provisions pertinent to this appeal:

“ARTICLE I

STATEMENT OF INTENTION

* * *

1.2 Amicable Settlement of Disputes. By this Agreement, the parties intend to effect an amicable resolution of their disputes, to mitigate the potential harm to the families and their children caused by differences that have arisen during the marriage, and to make reasonable provisions for the parties and their children in the event that irreconcilable differences or other difficulties arise at some future point in the marriage, which are not able to be resolved, with the result that either of the parties files a Petition for Dissolution

* * *

ARTICLE II

CUSTODY AND VISITATION/Joint Parenting Agreement

* * *

2.3 Michael and Sandra shall split evenly the residential care, custody, control, and education of the parties’ minor children: Michael, Nicholas, and Tessa.

* * *

ARTICLE IV

after she voluntarily dismissed her petition on April 23, 2004.

MAINTENANCE

4.3 Sandra covenants and agrees to and hereby does waive and release any and all rights she may have and to maintenance and support from Michael, whether past, present or future.

* * *

ARTICLE VI

REAL ESTATE-MARITAL RESIDENCE

* * *

6.3 With respect to the equity in the marital residence the parties agree that, as of the date of this agreement, [] Sandra's share of the equity of the marital residence is set at \$68,700.00. In the event of the filing of a Petition for Dissolution, Sandra would be entitled to a return of her equity (\$68,700.00) plus a one-half share of any percentage appreciation to the \$68,700 equity on the residence. In the event the parties elect to sell the present marital residence and purchase a new or additional residence, the formula would be the same and Sandra's share would remain one-half of the equity (\$68,700.00) as stated above plus a one-half share of any appreciation thereto. For example, if the parties sell the marital residence and purchase and [*sic*] additional home for \$500,000[,] [t]hen, at time of filing a petition for Dissolution, the fair market value of that home is \$750,000.00 (less any remodeling or major improvements to the home), then that would equal a 50% rate of return ($\$68,700 \times 50\% = \$34,350.00$). Therefore, based on this example, Sandra would be entitled to \$34,350 plus her initial equity of \$68,700, for a total distribution of \$103,050.00.

Appreciation shall be defined as any increase in the market value of a residence, excluding any capit[a]l expenditures such as additions or remodeling, less costs of sale, and shall, in no event, exceed an annual return greater than 10%.

6.4 From the date of this agreement and during the pendency of litigation, if any, between the parties, Michael shall maintain his residence in the marital home and shall be responsible for the mortgage payments, insurance, real estate taxes, utilities, the cost of any major capital repairs, minor repairs and the ordinary upkeep of the marital residence. Sandra would be entitled to her equity as defined above within six months of the youngest child reaching the age of 18, or such earlier time as the parties may agree.

* * *

ARTICLE VII

PENSION AND/OR RETIREMENT ACCOUNTS

7.1 Michael waives any and all interest in any current or future pension and/or retirement accounts Sandra may have[;] those accounts currently have an approximate value of \$3,000.00.

7.2 Sandra waives any and all interest she may have in any current or future pension/and or retirement accounts Michael may have. Michael's accounts currently have an approximate value of \$56,000.00.

ARTICLE VIII

PROPERTY DIVISION

* * *

8.2 Michael shall retain possession, control and/or sole ownership of the following property, free and clear of any and all claims thereto by Sandra, and which shall be considered ‘non marital property’ from the date of the agreement (notwithstanding the fact that such property might be considered ‘marital property’ by application of statute[]):

- A. His earnings and all future earnings payable to him or any corporation or partnership owned or acquired by him in the future;
- B. His vehicle or any replacement thereto, subject to any lien thereto.***
- C. All assets and personal[] possessions currently belonging to Michael or currently held in Michael’s name as of the date of this agreement.
- D. Any gifts of money or property to Michael from Sandra;
- E. Any money, advances, ownership interest in any business, advance of inheritance and/or inheritance from Michael’s father or mother.

8.3. Sandra shall retain possession, control and/or sole ownership of the following property, free and clear of any and all claims thereto by Michael ***

* * *

B. Her vehicle (or any replacement thereafter which has been mutually agreed to by the parties).”

Both Michael and Sandra were represented by attorneys when they signed the PNA. Sandra’s attorney recommended that she not sign, but she signed it anyway.

¶ 7 On November 9, 2012, Michael filed a petition for dissolution of marriage. He requested that the parties’ PNA be incorporated into the judgment of dissolution.

¶ 8 On December 3, 2012, Sandra filed a counter-petition for dissolution. On March 8, 2013, she filed a motion for declaratory judgment seeking a declaration that the PNA lacked consideration and was unconscionable. Also on March 8, 2013, Michael filed a “motion for hearing for enforcement of post-nuptial agreement.”

¶ 9 On April 29, 2013, the trial court conducted a hearing on Sandra and Michael’s motions. Sandra testified that she had filed a petition for dissolution (in 2003) and that she had sought custody of her children. She decided to attempt to reconcile with Michael after her attorney advised her that there was a possibility that she could lose custody of her children. She determined that it would be better if she went back into the marriage in order to raise her children.

¶ 10 She first saw the PNA after the reconciliation. She did not understand it. She recalled what Michael had told her regarding the PNA:

“He told me that I had two options. He said that if I wanted to stay, you know, and raise my children in the house and proceed to reconciliation, that I was either to get a legal divorce and still remain in the home and live with him or sign this paper.”

¶ 11 Michael thereafter hired an attorney to assist her. That attorney recommended that she not sign it because it was not in her best interests. At that time, she did not know what property her husband owned. He did not disclose to her what property, bank accounts, or retirement accounts that he had. She knew that Michael owned with his father a corporation that had investment properties. She did not know the value of that corporation. She explained that Michael handled all of the family’s finances.

¶ 12 She believed that, pursuant to the PNA, her interest in the marital residence terminated six months after her children were emancipated. She testified that in 2004 she did not know what maintenance was. In 2004, she did not have the ability to support herself.

¶ 13 Sandra testified that at the time she signed the PNA, she was feeling severe anxiety. She was crying and shaking. She was instructed to leave the room to regain her composure. It took her 5 to 10 minutes to partially regain her composure.

¶ 14 On cross-examination, Sandra acknowledged that she had received financial disclosures from Michael regarding her 2003 divorce petition. She did not believe that the disclosures were accurate, however. She also acknowledged that after she signed the PNA, she was able to stay with Michael in the same residence and raise their children together. That is what she wanted to achieve under the PNA.

¶ 15 Michael testified that the purpose of the PNA was to stop the divorce and to have Sandra return home and raise the children. He did not promise her any money in return. He did not want Sandra to proceed with the divorce in 2003 because they had already spent “\$60,000 of the kids’ college fund fighting in court.” He earned approximately \$100,000 in 2004. He never did anything to prevent Sandra from learning about his financial circumstances. She had signed their joint tax returns.

¶ 16 At the close of the hearing, the trial court found that the PNA was unenforceable because it lacked consideration. The trial court explained that the PNA was not valid because there was no indication in that document what the consideration was. Further, the trial court found that the dismissal of the 2003 divorce petition could not serve as consideration for the 2004 agreement

because that action had already been dismissed by the time that the parties entered into the 2004 agreement.

¶ 17 Michael thereafter filed a motion to reconsider. On June 26, 2013, the trial court denied that motion. The trial court stated that it found the PNA lacked consideration because by the time the parties entered into the agreement, the divorce case had been finished for four months. The trial court also found that the PNA was unconscionable. Specifically, the trial court found that the division of the parties' retirement benefits—that Michael would receive \$56,000 and that Sandra would receive \$3,000—was unconscionable. After the trial court found that there was no reason to delay enforcement or appeal of its order pursuant to Supreme Court Rule 304(a), Michael filed this timely notice of appeal.

¶ 18 ANALYSIS

¶ 19 On appeal, Michael argues that the trial court erred in finding that the PNA was not valid. He insists that the agreement was supported by consideration and that it was not unconscionable. As we find the unconscionability of the agreement to be dispositive of this appeal, we address only that issue.

¶ 20 A trial court may make a finding of unconscionability based on procedural unconscionability, substantive unconscionability, or some combination of the two. *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 21 (2006). A contract is procedurally unconscionable if an impropriety in the process of forming the contract deprived a party of a meaningful choice. *Id.* at 23. Substantive unconscionability involves a situation in which a clause or term in the contract is totally one-sided or harsh. *In re Marriage of Arjmand*, 2013 IL App (2d) 120639, ¶ 30. To determine whether an agreement is unconscionable, the court must consider two factors:

(1) the circumstances and conditions under which the agreement was made; and (2) the economic circumstances of the parties that result from the agreement. *Id.*

¶ 21 We first consider the issue of procedural unconscionability. Sandra argues that the PNA may be set aside on this basis because she signed it (1) under duress and (2) without receiving full disclosure of all of Michael's assets. We find Sandra's argument flawed. First, in determining whether a party signed a document under duress, courts will look to see whether that party was represented by an attorney when she signed the agreement. See *In re Marriage of Tabassum*, 377 Ill. App. 3d 761, 775-777; *In re Marriage of Richardson*, 237 Ill. App. 3d 1067, 1082 (1992). Here, Sandra was represented by an attorney who told her not to sign the PNA. Yet, she signed it anyway. These circumstances do not support a finding that she entered into the agreement under duress. See *Cron v. Cron*, 8 A.D. 3d 186, 186 (N.Y. A.D. 1 Dept. 2004) (wife did not sign prenuptial agreement under duress where record demonstrates that she was aware of husband's earnings and substantial assets, but nonetheless chose to sign the agreement, notwithstanding the contrary advice of her counsel, who represented her in a highly competent manner).

¶ 22 Second, although the PNA did not include a detailed list of all the parties' assets, this was not necessarily fatal to the agreement. See *Tabassum*, 377 Ill. App. 3d at 777 (questioning whether financial disclosures are required in postmarital reconciliation agreements as opposed to premarital agreements). Moreover, based on the divorce proceedings that she initiated in 2003, it is apparent that Sandra knew that Michael had many assets. In those proceedings, she asserted that Michael (1) earned \$300,000 a year; (2) had checking and savings accounts; (3) owned a marital residence in Bensenville; (4) owned commercial real estate; (5) owned automobiles; (6)

had a retirement plan; (7) owned a business known as Shoreline Autos; (8) owned a business known as Illinois Mortgage Company; and (9) owned a boat. Based on the circumstances, Michael's failure to list all of his assets in the PNA does not indicate that the PNA was procedurally unconscionable.

¶ 23 We next turn to a consideration of whether the PNA was substantively unconscionable, an issue which we review *de novo*. *Id.* We find that it is. The PNA provided that Sandra would receive no maintenance whatsoever. This was in spite of Sandra being in an almost 16-year marriage (at the time she signed the PNA) in which she had given up the chance to advance her career or earn more money by staying home to raise her children. At the same time, Michael was earning a salary of between \$100,000 and \$300,000 and had accumulated substantial assets. These factors would generally merit some award of maintenance, not no maintenance at all. See *In re Marriage of Schlitz*, 358 Ill. App. 3d 1079, 1084 (2005) (maintenance approved where one spouse has raised the children and supported the family, thereby forgoing employment and development skills, while the other spouse has obtained an education and become established in a profession); *In re Marriage of Selinger*, 351 Ill. App. 3d, 611, 618-619 (2004) (maintenance appropriate where spouses have disparate earning potentials).

¶ 24 In some circumstances, it may be appropriate for a spouse to receive a larger property division in exchange for not receiving maintenance. *In re Marriage of Durante*, 201 Ill. App. 3d 376, 383 (1990). However, the marital assets that Sandra received pursuant to the PNA cannot be considered "large." We note that our review is hindered because the PNA did not include a valuation of most of the marital assets. For most of those assets (Michael's ownership interest in two business, several vehicles, a boat, and several accounts), we just know that, according to

Sandra's pleadings, his interest in them was "substantial," and pursuant to the PNA she waived her right to almost all of them. We do know in 2003, the parties' had several vehicles, including a 2000 Dodge Durango, a 1998 BMW 5 Series, and a Mercedes S Class. They also owned a 21 foot Centurion power boat. These are all expensive vehicles and support an inference that the parties did indeed have substantial assets. This inference is further supported by Michael's testimony that, in 2003, the parties had at least \$60,000 in a college fund. We also know that the parties accumulated approximately \$59,000 in marital retirement accounts. See *In re Marriage of Davis*, 215 Ill. App. 3d 763, 773 (1991) (retirement benefits earned during the marriage are marital). (Since Michael was 19 at the time of the marriage and Sandra was 18, we presume that almost all, if not all, of the retirement benefits were earned during the marriage). The PNA provided that Michael would receive \$56,000 of those assets and Sandra would receive \$3,000. In other terms, Sandra received just 5% of that asset. Five percent is not a large portion. Cf. *Richardson*, 237 Ill. App. 3d at 1083 (postmarital agreement that awarded wife only 7.55% of the parties' marital assets was unconscionable).

¶ 25 The PNA also provides a formula to divide the equity in the parties' marital home. The formula provided that, in the event the home was determined to be worth \$750,000, Sandra would be entitled to receive only \$103,050, or 13.7% of the value of the home. Or, stated in different terms, the PNA provides that if the parties purchased a home for \$500,000 and the home increased in value to \$750,000, of that \$250,000, Sandra would be entitled to \$34,350 and Michael would be entitled to \$215,650. That represents Sandra receiving 13.7% of the appreciation of the home. Although section 6.3 of the PNA is somewhat unclear, under no

reasonable interpretation of that section do we find that Sandra receives an amount of equity comparable to the amount that Michael receives.

¶ 26 In sum, the PNA provided that, other than receiving her vehicle, Sandra would receive none of the parties' "substantial" ownership interests in various interests; 5% of the parties' retirement accounts; possibly as little as 13.7% of the interest in the parties' marital residence; and no maintenance. Michael insists that the PNA was fair because Sandra received the benefit of her bargain—the right to have custody of her children until the youngest one turned 18. We do not believe that the benefit that Sandra received from the PNA was commensurate with what she was giving up—the vast bulk of the parties' marital assets. Rather, as this contract strikes us as the type that no person in her senses would enter into and that no fair and honest person would accept, we hold that the contract is unconscionable. See *In re Marriage of Carlson*, 101 Ill. App. 3d 924, 930 (1981). To do otherwise would make us a handmaiden to iniquity, which we will not do. See *McCagg v. Woodman*, 28 Ill. 84, 89 (1862) (courts will not tolerate injustice); *Richardson*, 237 Ill. App. 3d at 1083 (court could not countenance in good conscience a bargain that awarded one party over 92% of the marital assets).

¶ 27 Michael argues that this case is no different than *Tabassum* where we determined that the postmarital agreement at issue was valid. Michael points out that in *Tabassum* at issue was a provision that benefitted one of the parties by approximately \$50,000. As that is almost identical to the difference in the retirement accounts awarded to each party in this case, he argues we should reach the same result in this case. Michael seems to suggest that since the difference in retirement account awards was the only thing that the trial court listed when it found that the PNA was unconscionable, that is the only thing this court may consider when addressing

whether the agreement was substantively unconscionable. We disagree. The PNA is unconscionable based on much more than just Michael receiving 95% of the parties' retirement accounts. It is also unconscionable based on Michael receiving a 100% interest in certain substantial assets, his receiving an interest that possibly exceeded 86% in the parties' marital home, and his not having to pay any maintenance despite Sandra making only a small income over the course of the parties' lengthy marriage. As such, the instant case is readily distinguishable from *Tabassum*, where the complaining spouse earned at least \$85,000 a year and the agreement did not require him to forfeit his rights to any marital property other than the equity in the marital home. *Tabassum*, 377 Ill. App. 3d at 768. *Id.* at 763-64.

¶ 28 Michael also argues that Sandra is not entitled to any relief because she was not credible when she testified as to the terms of the agreement. For example, she testified that she would lose all equity in the marital home six months after her children left the marital residence. Michael insists her interpretation is contradicted by the plain language of the PNA. However, for matters of substantive unconscionability, it does not matter how Sandra interpreted the provisions of the contract. It only matters how the reviewing court interprets the parties' agreement. *Id.* at 777.

¶ 29 Finally, we find disingenuous Michael's argument that the PNA was fair because it required him to pay 75% of the children's college expenses, their elementary school expenses, life insurance, medical care and costs for Sandra (as long as they were married) and the children, and be responsible for all the mortgage payments, real estate taxes, insurance, maintenance, and improvements for the residence and pick up all of the debts as well. All of these "requirements" were likely things Michael was doing already since he earned a substantial income and Sandra

did not. Further, if the parties divorced without having the PNA, he would likely have been obligated to pay those same expenses (if not more) because his income substantially exceeded Sandra's. Michael's argument seems to be that since he agreed to pay for the same things that he did during the marriage (other than any support for Sandra), he should be entitled to practically all of the assets that the parties' accumulated during the marriage. Such an argument reflects neither the law nor public policy of this state. See 750 ILCS 5/503(d) (West 2012) (marital estate is to be divided "in just proportions"); *In re Marriage of Tietz*, 238 Ill. App. 3d 965, 979 (1992) (goal of apportionment of marital property is to attain an equitable distribution).

¶ 30

CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 32 Affirmed.