21CA0591 Marriage of Alt 03-03-2022

COLORADO COURT OF APPEALS

Court of Appeals No. 21CA0591
Boulder County District Court No. 20DR30005
Honorable Andrew R. Macdonald, Judge

In re the Marriage of

Howard Alt,

Appellant,

and

Marlena Rich,

Appellee.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE JOHNSON
Berger and Brown, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 3, 2022

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Dietze and Davis, P.C., Tucker M. Katz, Boulder, Colorado, for Appellee

¶ 1 Howard Alt (husband) appeals the permanent orders entered on the dissolution of his marriage to Marlena Rich (wife). He argues that the district court erred by (1) defining his separate property as marital property under the parties' premarital agreement (PMA) and (2) allocating the debt for the parties' joint expert witness fees solely to him. We affirm the judgment as to the expert fees, reverse the property division provisions, and remand the case for further proceedings, including to determine wife's request for appellate attorney fees under section 14-10-119, C.R.S. 2021.

I. Background

A. The PMA

¶ 2 Shortly before their 2016 marriage, the parties entered into the PMA, stating that their intent was to provide "for a court-free determination of their respective rights in property they each have acquired before the date of [the PMA] . . . in the event of a dissolution" of their marriage. Under the PMA, the parties agreed, upon a dissolution of their marriage, to waive "any rights to a division of separate property" and to divide their marital property equally.

¶ 3 The PMA defines "separate property," in relevant part, as "[p]roperty owned by a party prior to the marriage of the parties, as set forth on Exhibits A and D respectively" and "[p]roperty acquired in exchange for or with the proceeds from the sale, lease, pledging or other use of the separate property of a party." Exhibits A and D list the parties' premarital separate assets and the value of those assets.

¶ 4 The PMA defines "marital property" as "all property acquired by either party or by both parties during the marriage" and that is not defined as separate property. Marital property also includes "the 'net appreciation' (defined as the total of the increase of the value of a party's separate property less the total of the decrease of the value of a party's separate property)" of wife's separate property other than her home and of husband's separate property other than his retirement accounts.

¶ 5 Under the PMA, "each party shall keep and retain sole ownership, control and enjoyment of his or her separate property of whatever nature and wherever located, . . . including the right to dispose of separate property by any means, . . . even though the

appreciation or depreciation of such separate property is considered marital property" on dissolution.

B. The Dissolution Proceedings

¶ 6 In 2020, husband petitioned for dissolution of the parties' marriage. The parties disagreed on the interpretation of the PMA concerning husband's separate property but neither party contended the PMA was ambiguous. Wife contended that husband had commingled his marital earnings into his three separate premarital nonretirement accounts located at Merrill Lynch, identified as ML accounts X383, X384, and X034, and that therefore these accounts were entirely marital property. Husband, on the other hand, argued that those accounts remained his separate property under the PMA and that any marital increase in value of his separate assets must be determined solely by the "net appreciation" method described in and contemplated by the PMA.

¶ 7 The parties retained a joint expert witness to create a marital spreadsheet and determine the parties' separate and marital property under the PMA based on each party's position. The parties agreed that husband would pay the expert using a joint credit card but that the fees would be reallocated at permanent orders. After

the joint credit card had insufficient funds to cover the expert fees, husband agreed to pay the remaining fees, again subject to later reallocation.

¶ 8 After a hearing, the district court agreed with wife's interpretation of the PMA, found that husband's premarital nonretirement accounts were entirely marital because they contained comingled marital and separate property, and divided the balances of the accounts equally between the parties. The court further found that husband had dissipated $10,000 in marital funds that he received during the marriage, and it awarded half of that amount to wife. It allocated all of the expert's $24,579 in fees to husband.

¶ 9 Accordingly, after accounting for the $360,000 husband had advanced wife during the proceedings, husband owed wife $34,418 to equalize the marital estate. The equalization payment was reduced to $20,767 in response to the parties' joint C.R.C.P. 59 motion.

II. Husband's Separate Property Under the PMA

¶ 10 Husband contends that the district court erred in interpreting the PMA provisions defining his separate property, finding that he

had improperly dissipated $10,000 in marital funds, and allocating all of the joint expert's fees to him. We agree as to the property division and dissipation of marital funds, but we disagree as to the expert fees.

A. Standard of Review and Applicable Law

¶ 11 A premarital agreement is an agreement between two people who intend to marry that affirms, modifies, or waives a marital right or obligation, including a property right, on dissolution of the marriage. *See* § 14-2-302(4)(d), (5), C.R.S. 2021. An agreement that is signed by both parties and complies with the Uniform Premarital and Marital Agreements Act, §§ 14-2-301 to -313, C.R.S. 2021, is effective upon the parties' marriage and is enforceable without consideration. *See* §§ 14-2-306, 14-2-307, 14-2-309, C.R.S. 2021. For parties to waive a property right, their premarital agreement must state that they are giving up rights to money or property if their marriage ends. § 14-2-309(3).

¶ 12 We review de novo the district court's interpretation of the PMA. *In re Marriage of Williams*, 2017 COA 120M, ¶ 11. In doing so, we need not defer to the court's interpretation. *Id.*

¶ 13 Our goal in interpreting the PMA is to determine and give effect to the parties' intent as reflected in the language of their contract. *In re Estate of Gadash*, 2017 COA 54, ¶ 40. Contracts must be construed in their entirety according to the plain and generally accepted meaning of the language used, harmonizing and giving effect to all provisions. *Mid Century Ins. Co. v. Gates Rubber Co.*, 43 P.3d 737, 739 (Colo. App. 2002); *see In re Marriage of Stokes*, 43 Colo. App. 461, 466, 608 P.2d 824, 829 (1979) ("Courts cannot rewrite contracts or add terms thereto.").

B. Analysis

¶ 14 As the district court found, the PMA's description and illustrative example of its "net appreciation" method for determining the marital increase in value of the parties' premarital separate property is clear and unambiguous. Under this method, the net appreciation of the parties' premarital separate assets, except for husband's retirement accounts and wife's home, is marital property. "Net appreciation" under the PMA means the total increase in value during the marriage of a party's separate assets combined less the total decrease in value of those assets. As the PMA's example makes clear, the date of marriage values of the

parties' premarital assets to use in the formula are those listed in Exhibits A and D to the PMA.

¶ 15 Although the court found the "net appreciation" provision unambiguous, it failed to apply the provision as instructed in the PMA's example. Instead of using the premarital asset values in Exhibits A and D and comparing those to the values at dissolution, the court determined that all three of husband's premarital separate nonretirement accounts listed in Exhibit A became entirely marital property because husband deposited his marital earnings in the accounts, comingling separate and marital property. But the PMA does not prohibit husband from commingling marital funds and separate property in these accounts. The PMA specifically forbids husband from depositing marital funds, including his earnings, in his two premarital *retirement* accounts. There is no mention of his three *nonretirement* accounts. Had the parties intended for him not to deposit marital funds into those three accounts, the PMA would certainly have said so rather than specifically referring *only* to the two retirement accounts. *See 23 LTD v. Herman*, 2019 COA 113, ¶¶ 34-36 (a contract provision

allowing a court to modify only two particular restrictions on enforceability suggests that *only* those two items can be modified).

¶ 16 The PMA further explains that each party shall retain sole ownership and control of his or her separate property "wherever located," including the right to dispose of such property "even though the appreciation or depreciation of such separate property is considered marital property" under the PMA. Also, the parties have equal rights to control and use marital property during the marriage until a petition for dissolution is filed.

¶ 17 Interpreting and harmonizing these provisions based on their plain language, husband's three nonretirement accounts remained his separate property, as valued in Exhibit A to the PMA, on dissolution and *only* the net appreciation, defined as the total increase in value at the time of dissolution of all of husband's premarital assets combined less the total decrease in value, is marital property. In other words, the assets listed in Exhibit A remained husband's separate property under the PMA no matter the nature of the assets or where they were located. Therefore, regardless of whether husband's premarital funds were commingled with marital assets, they remained separate to the extent of the

values in Exhibit A. By applying commingling analysis to render husband's three premarital nonretirement accounts entirely marital, the court gave wife more than she bargained for under the PMA. The court gave her husband's premarital separate property in these accounts contrary to the PMA's provision allowing him to retain ownership of such property as defined in Exhibit A no matter the form or location. Under the PMA, husband is obligated to share with wife only any net appreciation of all of his separate assets that exists at dissolution.

¶ 18 Because the PMA contains the waiver of property rights language required by section 14-2-309(3), we reject wife's argument that additional language was required to specify that she was waiving her right to argue that husband's separate property could become marital property based on commingling. The terms of the PMA establishing the net appreciation method for determining the marital increase in value of separate property, permitting the parties to preserve the value of their separate premarital property no matter the form or where located, and permitting them to use both marital and separate property during the marriage are explicit regarding how separate property will be treated on dissolution and

that separate property will not become marital merely if commingled with marital property.

¶ 19 Contrary to wife's argument, the PMA *does* address the concept of commingling. It expressly prohibits it for husband's two *retirement* accounts while saying nothing about it regarding the three nonretirement accounts that are at issue here. *See 23 LTD*, ¶¶ 34-36.

¶ 20 Accordingly, we reverse the property division portion of the judgment and remand the case for the court to apply the PMA's net appreciation formula, as shown in the example contained in the PMA's footnote, to determine any marital portion of husband's premarital nonretirement accounts.

¶ 21 We turn to the proceeds that husband received during the marriage from Enapta, his business entity. Enapta received $342,186 when Homer Energy, of which it was part owner, was sold. Husband's interest in Enapta is defined in Exhibit A as his separate property valued at $371,543 and consisting primarily of the company's equity in Homer Energy. The district court included a value of husband's interest in Enapta at the time of the marriage and a value at dissolution as part of the overall equation to

determine the net appreciation, if any, of husband's overall separate property. Contrary to wife's contentions, it does not matter for the PMA's net appreciation method that part of Enapta's value at dissolution came from funds Enapta received during the marriage from the sale of Homer Energy or that husband had transferred $200,000 of those funds to one of his nonretirement accounts, ML X384. Rather, under the PMA, husband's separate premarital property as defined and valued in Exhibit A, including both Enapta and his nonretirement accounts, remained separate and under his complete control during the marriage regardless of its form or location and despite that any appreciation of that property during the marriage would ultimately be marital property under the net appreciation formula on a dissolution.

¶ 22 Similarly, the $10,000 gift husband gave to a friend out of the $200,000 in Enapta funds he deposited in account ML X384 was his property to use under the PMA, including to dispose of by gift. This transaction occurred during the marriage and the PMA gave both parties the power to use both separate and marital property during the marriage. The district court did not find husband disposed of these funds improperly in anticipation of the

dissolution. Therefore, the court erred by characterizing the funds, which no longer existed at dissolution, as marital property.[1]

¶ 23 Because, as husband asserts, the district court's disposition of the $84,809, which was withheld from Enapta out of the $342,186 proceeds from the sale of Homer Energy, is not challenged on appeal, we do not address that issue.

¶ 24 In sum, the PMA requires that husband's premarital separate property, as it is defined in Exhibit A of the PMA, remain separate no matter its nature or location and that any marital increase in value of his separate property be determined under the net appreciation formula. The PMA further contemplates that husband might dispose of his separate assets during the marriage and it allows him to do so "even though" the net appreciation of such assets will be considered marital property in the event of a dissolution. And the PMA allows both parties to control and use marital property during the marriage until a petition is filed. Thus,

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[1] We acknowledge that husband makes an additional argument about the Enapta payment and the $10,000 gift as part the expert's alternative calculations based on a tracing analysis due to wife's argument of commingling. We need not address this additional argument, however, because, as already discussed, the district court's commingling analysis is contrary to the PMA.

the district court erred by interpreting the agreement such that husband's premarital property became marital property by virtue of it being commingled in his nonretirement accounts with marital assets and that he had dissipated $10,000 of the Enapta funds by giving them to a friend during the marriage and before the petition was filed.

¶ 25 On remand, the court must apply the net appreciation formula that the parties bargained for in the PMA, as shown in the example provided in the PMA and using the values in Exhibits A as the starting point, to determine whether there is any marital increase in value of husband's premarital separate assets and reconsider the property division accordingly. The court must also reconsider maintenance and attorney fees under section 14-10-119 based on the revised property division. *In re Marriage of de Koning*, 2016 CO 2, ¶ 26.

III. Expert Fees

¶ 26 We reject husband's argument that the district court erred by allocating all of the joint expert witness fees to him rather than allocating the fees equally under the PMA as a marital debt. He points specifically to a provision in the PMA that all debts "incurred

jointly during the marriage of the parties" shall be considered marital debt and divided equally.

¶ 27 But fees for a joint expert witness in a dissolution case are governed by CRE 706. *See* C.R.C.P. 16.2(g)(2)(A). They are not treated as marital debt. *See In re Marriage of Burford*, 26 P.3d 550, 559 (Colo. App. 2001). And the PMA does not treat joint expert fees at dissolution differently than as contemplated by the court rule.

¶ 28 Under Rule 706, the court may order the parties to pay expert fees in such proportions and at such time as the court directs, in like manner as other litigation costs. CRE 706(b); *see also* § 14-10-119 (the court may, from time to time and after considering the parties' financial resources, order one party to pay the other party's reasonable costs incurred for the action). The court has discretion in allocating expert fees. *See Laleh v. Johnson*, 2017 CO 93, ¶ 18 (reviewing trial court's decision to award expert witness fees for abuse of discretion); *see also In re Marriage of Gutfreund*, 148 P.3d 136, 141 (Colo. 2006) (courts have great latitude when awarding fees and costs under section 14-10-119).

¶ 29 In stipulating to pay the expert fees on a joint credit card, the parties specified that the fees would be subject to reallocation at

permanent orders, and that is what happened. The court determined at permanent orders that it would be fair and equitable for husband to pay the entire expert fee. We discern no error by the court in doing so.

¶ 30 Because the court must reconsider the property division on remand, however, it should also reconsider the fee award as necessary based on the new property division. *See de Koning*, ¶ 26.

IV. Appellate Fees and Costs

¶ 31 Wife requests her attorney fees and costs incurred on appeal under section 14-10-119, asserting that husband's income is more than four times greater than her income. We direct the district court, which is better equipped to evaluate the parties' current relative financial resources, to determine wife's request on remand. *See* C.A.R. 39.1; *In re Marriage of Alvis*, 2019 COA 97, ¶ 30.

V. Conclusion

¶ 32 Because the district court erred by interpreting the PMA contrary to its unambiguous language, the property division portion of the judgment is reversed, and the case is remanded to the district court for reconsideration of that issue and of maintenance, attorney fees, and expert witness fees based on the revised property division.

The court should also determine wife's section 14-10-119 appellate attorney fee request.

¶ 33 In all other respects, the judgment is affirmed.

JUDGE BERGER and JUDGE BROWN concur.