
Fees Not Precluded by Ante-Nuptial Agreement

Prior to their marriage in 2005, the parties entered into an Ante-nuptial Agreement which addressed, among other issues, debts acquired in the parties' own names and how they would be attributed both prior to or subsequent to the marriage. The husband filed for divorce in 2009. Judge David Delgado entered an order in February of 2011 finding that the Agreement was valid and enforceable. In May of 2011, the wife filed a petition for contribution for attorney fees and costs. The husband argued that such fees were "debts" under their Ante-nuptial Agreement, and therefore, he was not responsible nor could she petition him for contribution. Judge Grace D. Dickler disagreed, and ordered the husband to pay 75% of the wife's outstanding fees.

The wife was represented by John F. Martoccio and Lucy Vazquez of Martoccio & Martoccio. The husband was represented by Christopher Edmonds from the Law Offices of Christopher Edmonds.

The parties were married in 2005 and had two children. The wife was a stay at home mother and was not otherwise employed. She had no assets, and spoke little English. In the past, she had worked as a construction flagger at an annual salary of approximately \$25,000. The husband was an assistant Fire Chief and earned a salary of approximately \$109,000. He was also a small business owner.

Prior to the parties' marriage, they signed an Ante-nuptial Agreement. At the time, both parties were represented by counsel. The Agreement was prepared by the husband's attorney, who, at the time, was James Laraia of Laraia & Hubbard. The wife, who is Spanish and speaks very little English, was represented by Ana Mencini. Ms. Mencini translated the Agreement for the wife and reviewed with her the new revisions that were made to the Agreement. A court reporter was present for the review of the Agreement.

The husband filed a Petition for Dissolution in September 2009. That same month, the wife hired Martoccio & Martoccio to represent her in the dissolution action. The firm largely delegated the duties of the case to Lucy Vazquez, a new addition to the firm. Although she began her employment in August 2009, she was not admitted to the Illinois Bar until November 2009.

On February 10, 2011, after a hearing at which all parties were present, Judge David Delgado entered an order finding that the Ante-nuptial Agreement was valid and enforceable. On March 11, 2011, the wife filed a motion to vacate the February 10th order and it was denied. The matter was continued to May 5, 2011 for entry of a Judgment and a Joint Parenting Agreement, at which time the wife filed a petition for contribution to attorneys' fees and cost. The Judge denied the wife's motion and entered the Judgment.

The wife filed a Motion to Reconsider Judge Delgado's ruling denying her petition for fees in June 2011. The matter was heard before Judge Grace G. Dickler. The wife contended that the Judge Delgado erred in denying her petition for contribution to attorneys' fees. She claimed she did not waive her statutory right to seek contribution (750 ILCS 5/508(a)) when she signed the Ante-nuptial Agreement because it was silent on the issue of attorney's fees. She further

argued that a layman would not conclude that the term “debts” included attorneys’ fees and costs when “debts” was not defined in the Agreement and did not explicitly reference attorney fees.

The husband argued that it was an obvious assumption that there were attorney’s fees in dissolution of marriage cases and, therefore, an assumption of “debts” as provided for in the Ante-nuptial Agreement clearly included attorney’s fees. He also argued that the burden was on the wife to have raised any questions she had regarding the definition of “debts” or attorney fees at the time the parties were reviewing the Agreement.

Judge Dickler found that attorney fees could not be presumed to be included in the definition of debts as used in a Premarital Agreement when the term was not specifically defined to include attorney fees. “Courts have considered the allocation of assets and liabilities, the award of maintenance, and the relative earning abilities of the parties when determining whether one party should contribute toward the payment of the other party’s attorney fees.” *In re Marriage of McGuire*, 305 Ill. App.3d 474(1999). Since an award for attorney fees was determined either after or in conjunction with a division of the marital property, which encompasses the allocation of the marital debts and liabilities, Judge Dickler believed that the courts view attorney fees separately from the general use of the word “debt.”

Because courts do not use the term “attorney fees” and “debts” interchangeably, the second part of the question to address was whether the term “debts” as used in the parties’ Agreement could be viewed to include attorney fees. Judge Dickler noted that it had become apparent in the recent line of cases tackling waiver of attorney fees in Premarital Agreements that the courts were placing narrow constraints on such waivers, requiring them to be explicit and, even if they are explicit, they must not go against public policy. In *Rosenbaum-Golden*, the court held that parties to a Premarital Agreement cannot waive their right to interim attorney fees. *In re Marriage of Rosenbaum-Golden*, 381 Ill.App.3d 65 (2008).

In addition, the Judge noted that courts have found that fee-shifting bans in Premarital Agreements are not enforceable as to child-related issues because they violate public policy by discouraging both parents from pursuing litigation in their child’s best interest. *In re Marriage of Best*, 387 Ill. App. 3d 948 (2009), *appeal denied* 232 Ill. 2d 577. The parties had two children, so the Judge deduced that any attorney fees accumulated from addressing child related issues could not be waived and the wife was entitled to a hearing for contribution regarding those specific fees.

The Judge also cited *Cullom*, which addressed the specificity required in order to waive attorney fees. *In re Marriage of Cullom*, 185 Ill.App.3d 1029. The wife, on appeal, challenged the trial court Judge’s interpretation of the parties’ Ante-nuptial Agreement that the Agreement prohibited the wife from recovering attorney fees. Since the parties’ Ante-nuptial Agreement did not contain an explicit waiver of fees, the appellate court carefully reviewed the general waiver clause in the Agreement to determine whether the right to request contribution or an award attorney’s fees was implied in the rights that were waived under the clause.

The appellate court found that the clause intended to bar recovery of all rights and claims that arose directly out of the law upon marriage, such as inheritance rights and entitlement to

property. In distinguishing the right to attorney's fees from the rights arising from the law upon marriage, the court explained that attorney's fees are ancillary to the claims arising out of dissolution proceedings and not integral to the rights a person acquires by law upon marriage. The appellate court also held that parties' can waive their right to seek attorney fees, but they must expressly state that intention in any agreement they sign.

In the instant case, during the signing of the Agreement, when addressing the wife's understanding of the Ante-nuptial Agreement, the husband's attorney only referred to particular sections of the Agreement. The paragraph regarding "debts" was never raised or discussed. Both parties agreed that the Agreement never explicitly defined the term "debts" nor did it mention attorney fees anywhere in the document. Although both parties were represented by counsel at the time of the execution of the document, Judge Dickler felt she could not use that fact as the basis for determining whether the wife waived her right to attorney fees when the facts indicated that the term "debts" was never defined in the Ante-nuptial Agreement or at the time of the recording of the execution of the Agreement. Therefore, Judge Dickler determined, as a matter of law, the term "debt" does not include attorney fees unless so specified in the definition of the term in a Premarital Agreement.

In March, 2012, Judge Dickler ruled on the wife's petition for contribution for attorney's fees. Martoccio & Martoccio billed the wife a total of \$64,665. They had been paid \$11,000 and the wife requested that the husband pay the remaining balance of \$53,655. Judge Dickler had to determine the reasonableness of the wife's attorney fees and the amount, if any, that the husband would have to contribute. Overall, the Judge found the amount of time billed by the wife's attorneys to be reasonable. She held that the reasonable fees that remained due were \$37,543.04.

It was evident to the Judge that the wife could not pay the totality of her own fees. She ordered the husband to pay 75% of the wife's total outstanding fees and costs in the amount of \$28,157.28. The wife was ordered to pay the remaining 25% totaling \$9,385.76.

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