NOT DESIGNATED FOR PUBLICATION

No. 93,934

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CARA DUTTON,
Appellee,

v.

EDWARD LAINE,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; ERIC R. YOST, judge. Opinion filed March 31, 2006. Affirmed.

Jeffrey R. Emerson, of Conlee Schmidt & Emerson, LLP, of Wichita, for the appellant.

William A. Vickery, of Wichita, for the appellee.

Before HILL, P.J., GREENE, J., and BUKATY, P.J.

Per Curiam: Cara Dutton and Dr. Edward Laine decided to live together. They entered into a written agreement concerning their property. Shortly thereafter, they separated and a dispute arose over how to divide some of the property purchased after the

date of the agreement. The trial court determined that the agreement did not specify how joint property would be divided upon separation. It then proceeded to order a division based on equitable principles. It also denied Laine's request for attorney fees. Laine appeals, and Dutton requests attorney fees on appeal. We affirm after determining the trial court properly construed the agreement and did not abuse its discretion in dividing the property and denying attorney fees to Laine. We further deny Dutton's claim for attorney fees on appeal.

The parties worked together at Via Christi Hospital in February 2002 and began dating. When they decided to live together, Dutton downloaded an internet form of "Prenuptial/Cohabitation Agreement" (agreement) and revised it several times. Dutton and Laine dated and signed the agreement on April 25, 2004. The agreement included the following provisions:

> "WHEREAS the parties hereto are about to enter into marriage/cohabitation with each other on April 29, 2004 and they desire to fix and determine by this Agreement the status, ownership and division of property, including future property, owned by either or both of them;
>
> "AND WHEREAS the parties desire by this Agreement to provide for the settlement of their affairs under the marriage/cohabitation or upon annulment or dissolution of the marriage/cohabitation as set out herein;
>
> "AND WHEREAS it is the parties['] desire and wish that this Agreement should apply to property, real or personal, owned by both of them or by each of

them at the time this Agreement is entered into and such further property as shall be acquired hereafter;

. . . .

"NOW THEREFORE in consideration of the upcoming marriage/cohabitation, and in consideration of the mutual love and affection each party bears for the other, and in consideration of the mutual promises and covenants contained herein, the parties agree as follows:

. . . .

"3. PROPERTY

"a. The separate property owned by each party at the execution of this Agreement and in the future, however and whenever acquired, as set out in Schedule 'A' attached hereto including but without restricting the generality of the foregoing, any increase in value of or from income of the property, shall be owned and managed solely by such party at all times and shall remain the separate property of such party after the execution of this Agreement, with no claim by the other party upon separation or otherwise."

Schedule "A" of the agreement included the following provision: "In the event that the parties should ever separate and divide their assets, it is agreed that, prior to the division of assets between Edward and Cara, Edward [and Cara] shall retain ownership, including future increases in value, of : . . Current and future personal belongings and furnishings."

The agreement contained several other provisions not relevant to the issues in this appeal.

On the same day they signed the agreement, Dutton and Laine went to Dillard's and purchased living room furniture. They selected eight pieces--a sofa, ottoman, tables, and chair--for approximately $11,600. Testimony at trial reflected that Laine paid $9,600 and Dutton paid $2,000 both in cash.

Three days later, the parties closed on the purchase of a new residence on Wilderness Circle, Wichita, with a price over $400,000. Dutton did not contribute to the purchase price, but her name was on the deed as a joint tenant with right of survivorship along with Laine and his mother. Laine stated he did not know the meaning of a joint tenant with right of survivorship until his attorney informed him later in the summer.

Shortly after moving in together, Laine purchased a refrigerator with his credit card to replace one that Dutton owned but which had been ruined in the move. Over a month after the move, he purchased a drawing room sofa and ottoman for $3,080 with his credit card. He also bought a lawnmower and weed eater with his money.

Both parties brought various furniture items they had previously owned into the house. They are not in dispute in this case.

As to expenses, Dutton paid for groceries for her and her three children by a former relationship who were living with the parties. She also paid the utilities. Laine bought his groceries and paid the $3,260 monthly mortgage payment.

On July 13, 2004, Dutton filed a protection from abuse (PFA) petition stating she was afraid of Laine and alleging that he grabbed her arms to keep her from leaving and would not let her out of the master bathroom. Apparently, she obtained an ex-parte order granting her possession of the residence, but within a few days the trial court entered an order returning possession to Laine. About a week later, the court issued an "agreed order to obtain personal property" allowing Dutton to return to the residence to retrieve her personal belongings and those of the children. The court limited her retrieval to the specific items listed in the order. She subsequently removed those items several weeks later.

In October, 2004, Dutton filed an amended petition, requesting that the trial court divide the property to which she was entitled out of the cohabitation with Laine and award attorney fees in the prosecution of the action. Laine denied the existence of any domestic relationship which entitled Dutton to ownership of personal property and also requested attorney fees.

Following the hearing, the trial court found the cohabitation agreement contained no provision regarding jointly acquired property and it was silent as to how such property would be divided in the event the parties discontinue cohabitation. It also found Dutton had signed a quitclaim deed to Laine for the residence.

The trial court then proceeded to divide the property acquired after the date they had signed the agreement. It awarded to Dutton "the Vienna red ottoman, the Vienna cocktail table, the Tier Acquisitions, floral couch and chair with round ottoman, and the side-by-side refrigerator." The court awarded to Laine all interest in the real estate at Wilderness Circle, plus "sofa-vienna red, end table-vienna, chrsd acquisitions, chair-vienna red, chair-vienna quilt, lawn mower, weed eater and computer." The court denied both parties' request for attorney fees.

Laine filed a timely notice of appeal challenging the division of the personal property. Dutton filed a motion for attorney fees and expenses on appeal. The parties do not dispute the award of the residence to Laine.

Laine first challenges the trial court's conclusion that the agreement contains no provision regarding jointly acquired property and is silent as to how jointly acquired property would be divided in the event the parties discontinue cohabitation.

Neither party seems to challenge the fact the agreement constitutes a valid contract and that its terms are binding on each of them. The dispute centers on whether the terms of the agreement provide for a disposition of the property acquired by them after the date of the agreement or whether it is silent on the issue.

Laine argues that most of the property in question was his and that the agreement expressly specifies that any property acquired by either party after the execution of the agreement was to remain with that party upon any separation. Dutton essentially argues in support of the trial court ruling that the property in question was acquired jointly as opposed to individually by either party and the agreement does not address what will happen to such property bought after the date they signed the agreement and began cohabitation.

The interpretation and legal effect of written documents are matters of law, and an appellate court exercises unlimited review. Regardless of the construction given a written contract by the trial court, the appellate court may construe a written contract and determine its legal effect. *Unrau v. Kidron Bethel Retirement Services, Inc.*, 271 Kan. 743, 763, 27 P.3d 1 (2001). The question of whether a written instrument is ambiguous is a question of law subject to de novo review. *Liggatt v. Employers Mut. Casualty Co.*, 273 Kan. 915, 921, 46 P.3d 1120 (2002).

Laine argues that the following language of the agreement expressly addresses the issue in dispute and compels a ruling in his favor:

> "[T]his Agreement should apply to property, real or personal, owned by both of them or by each of them at the time this Agreement is entered into and *such further property as shall be acquired hereafter*;
>
> . . . .
>
> "a. The separate property owned by each party at the execution of this Agreement and *in the future, however and whenever acquired*, as set out in Schedule 'A' attached hereto including but without restricting the generality of the foregoing, any increase in value of or from income of the property, shall be owned and managed solely by such party at all times and shall remain the separate property of such party after the execution of this Agreement, with no claim by the other party upon separation or otherwise." (Emphasis added.)

Schedule "A" included the following provision: "In the event that the parties should ever separate and divide their assets, it is agreed that, prior to the division of assets between Edward and Cara, Edward [and Cara] shall retain ownership, including future increases in value, of . . . Current *and future* personal belongings and furnishings." (Emphasis added.)

Clearly, this language specifies that the agreement was to apply to all real and personal property owned by the parties both before and after the date of their agreement.

Additionally, it provides that the separate property of each would remain their separate property upon separation. Where Laine's argument fails, however, is that the agreement says nothing about how jointly owned property would be divided upon separation or how it would be determined whether property was jointly owned or separately owned. We find no language that creates an ambiguity on this point. There is simply no language covering the issue. The trial court correctly interpreted the agreement.

While the trial court's written order does not specifically state a finding that the property in question was jointly owned, that certainly is the implication. It also is the premise on which Laine argues his next two issues on appeal, namely, the court erred in finding the property was jointly owned and the court abused its discretion in dividing it. We disagree with the argument.

The trial court is authorized, in the exercise of its inherent power to do equity, to make a division of such property as may have been jointly accumulated by the parties or acquired by either with intent that each should have an interest during the period they lived together all in such manner as the court in its discretion may find to be just and equitable. *Eaton v. Johnston*, 235 Kan. 323, 329, 681 P.2d 606 (1984).

Laine argues that he paid for all the items in question and, consequently, they became his separate property and were not jointly acquired. He further argues that

Dutton's testimony that she paid $2,000 towards the purchase of the furniture should be disregarded because it lacked credibility and support in the other evidence.

Laine's argument ignores the basic premises of the agreement and their living arrangement. Even though Dutton and Laine were not married, they entered into the agreement with the consideration of "the mutual love and affection each party bears for the other, and in consideration of the mutual promises and covenants."

In re Marriage of Thomas, 16 Kan. App. 2d 518, 825 P.2d 1163, *rev. denied* 250 Kan. 805 (1992), provides guidance. *Thomas* also dealt with the division of property of parties where there was no legal marriage either formally or by common law. One party argued the trial court had no authority to divide their assets on an equitable basis as if it were dissolving a marriage, but could only do so pursuant to the Uniform Partnership Act, K.S.A. 56-301 *et seq.* (now repealed). 16 Kan. App. 2d at 520. The *Thomas* court held that the trial court did have authority to make an equitable division of property, citing *Eaton*, 235 Kan. at 329.

Even though a disparity existed in the income of the parties, they both contributed to household expenses and lived in a residence together as a family. Dutton and Laine went to the store and picked out these furniture items together. It is clear they intended to use the items together in their new house, and the items were jointly acquired for that

purpose, notwithstanding the source of payment for the items. It certainly defies logic to suggest that only Laine was going to use the refrigerator and the furniture that he purchased with his credit card to the exclusion of Dutton and the children residing with them. The trial court awarded Dutton roughly half of the furniture in question. We find no abuse of the court's discretion.

Laine next argues the trial court abused its discretion in denying his request for attorney fees and costs under K.S.A. 60-3107(a)(7). K.S.A. 60-3107 provides: "(a) The court may approve any consent agreement to bring about a cessation of abuse of the plaintiff or minor children or grant any of the following orders . . . (7) Awarding costs and attorney fees to either party."

Where the trial court has authority to grant attorney fees, we review the decision under the abuse of discretion standard. *Knuth v. State Farm Mut. Auto. Ins. Co.*, 30 Kan. App. 2d 184, 185, 41 P.3d 287 (2000).

Laine argues Dutton failed to allege any physical injury or attempt to cause her bodily harm, and none was ever proved. He points out that the trial court never entered an order restraining him from abusing Dutton or interfering with her privacy. He goes on to urge that Dutton used the PFA procedure merely to obtain property and remove Laine from the home.

We note at this point that Dutton requested attorney fees and the trial court also denied that request. She did not appeal that denial.

We also note that Dutton eventually amended her petition to request a division of property and apparently dropped her request for PFA order. That does not mean, however, that this litigation she commenced was frivolous. Obviously, the parties could not agree on a property division and needed court intervention to resolve the dispute. Also, the lack of evidence of physical injury or attempt to cause physical harm does not render the PFA petition frivolous. See *Trolinger v. Trolinger*, 30 Kan. App. 2d 192, 198, 42 P.3d 157, *rev. denied* 273 Kan. 1040 (2002).

The trial court did not abuse its discretion in denying Laine's request for attorney fees and costs.

Lastly, Dutton filed a motion for attorney fees and expenses pursuant to Rule 7.07 (2005 Kan. Ct. R. Annot. 56). Dutton claims Laine's appeal was frivolous and brought solely for the purpose of harassing her. Laine responded that this is a contract case where the trial court erroneously entered an award dividing property.

Supreme Court Rule 7.07(c) (2005 Kan. Ct. R. Annot. 57) provides in part: "If the appellate court finds that an appeal has been taken frivolously, or only for purposes of harassment or delay, it may assess against an appellant or appellant's counsel, or both, the cost of reproduction of the appellee's brief and a reasonable attorney fee for the appellee's counsel."

This domestic case involves a dispute over a division of property between two persons who used to live in the same residence. The issue on appeal boiled down to whether the trial court abused its discretion in its order of division. The issues were not frivolous nor were the arguments. Dutton's motion for attorney fees and expenses on appeal is denied.

Affirmed.