

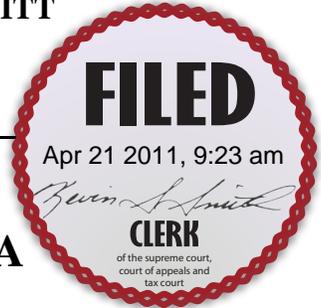
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**IN THE
COURT OF APPEALS OF INDIANA**

CHARLES R. BILYEU,
Appellant-Petitioner,

vs.

FRANI BILYEU,
Appellee-Respondent.

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No. 06A05-1006-DR-356

APPEAL FROM THE BOONE CIRCUIT COURT
The Honorable Steven H. David, Judge
Cause No. 06C01-0807-DR-689

April 21, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Charles R. Bilyeu (“Husband”) appeals the trial court’s order that he pay the attorney’s fees of Frani Bilyeu (“Wife”) upon the dissolution of their marriage. Husband raises a single issue for our review, namely, whether the trial court erred when it ordered Husband to pay Wife’s attorney’s fees. We reverse and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On April 8, 2005, Husband and Wife executed a premarital agreement that provided, among other things, that neither shall “demand, claim, take or receive from the other party attorney’s fees or other litigation expenses to which he or she might otherwise be entitled by reason of any rights arising out of the marriage and the relationship of the parties.” Appellant’s App. at 36. The agreement further provided that it “shall not be modified except by a written agreement of equal dignity and executed by both parties.” *Id.* at 38. The next day, Husband and Wife were married. Husband filed a petition for dissolution of the marriage on July 28, 2008.

On October 1, 2008, Husband, Wife, and their respective attorneys signed an agreed provisional entry that provided, among other things, that “[t]he issue of [H]usband’s contribution to [W]ife’s attorney[’s] fees may be reserved for the final hearing.” *Id.* at 25. The trial court accepted the agreed entry that same day.

On June 16, 2009, Husband filed a motion to determine the validity and enforceability of the parties’ premarital agreement. The court held an evidentiary hearing on that motion on August 19. On September 21, 2009, the court entered its order on

Husband's motion, expressly concluding that the premarital agreement "is valid and enforceable." Id. at 79.

Thereafter, on March 11, 2010, the trial court entered its dissolution decree, with findings of fact and conclusions thereon. In the decree the court again acknowledged that the original premarital agreement was "valid and enforceable." Id. at 10. But the court also concluded that Husband "has far superior earnings and earnings potential over [Wife. Husband] shall pay a portion of the [Wife's] attorney[']s fees in the amount of \$5,500" Id. at 18. Husband filed a motion to correct error, which the trial court denied. This appeal ensued.

DISCUSSION AND DECISION

Husband contends that the trial court erred when it ordered him to pay \$5,500 of Wife's attorney's fees. Generally, "[a] trial court enjoys broad discretion in assessing attorney's fees in dissolution cases." Russell v. Russell, 693 N.E.2d 980, 984 (Ind. Ct. App. 1998), trans. denied. However, where, as here, the decision to award attorney's fees turns on the construction of written documents, we apply a de novo standard of review. See Gillette v. Gillette, 835 N.E.2d 556, 561-62 (Ind. Ct. App. 2005). The primary and overriding purpose of contract law is to ascertain and give effect to the intentions of the parties. Id. If the intention of the parties can be gleaned from their written expression, that intention must be effectuated by the court. Id. In determining the parties' intent, we must read all of the contractual provisions as a whole. Id.

Again, Husband asserts that the trial court erroneously ordered him to pay Wife's attorney's fees. We must agree. Under the plain terms of their premarital agreement, Husband and Wife must pay their own attorney's fees.

Nonetheless, Wife contends on appeal that "the parties amended their premarital agreement by signing an Agreed Provisional Entry." Appellee's Br. at 6. But the agreed entry of October 1, 2008, did not amend the premarital agreement's provision on attorney's fees. Rather, the agreed entry stated, "[t]he issue of [H]usband's contribution to [W]ife's attorney[']s fees may be reserved for the final hearing." Appellant's App. at 25 (emphasis added). By agreeing to reserve the issue, the parties and the trial court agreed to defer resolution of whether Husband should pay Wife's attorney's fees until a later hearing. A reservation is not a concession. In the agreed entry Husband did not agree that he would be or could be liable for Wife's attorney's fees.

Subsequently, a year after the agreed entry, the court conducted a hearing and on September 21, 2009, the court entered an order finding that the original premarital agreement was "valid and enforceable." Id. at 79. The order did not mention that the premarital agreement had been modified by a subsequent agreement of the parties. In other words, the September 21, 2009, order affirmed the premarital agreement in all respects and without exception. The trial court's determination that the premarital agreement was valid and enforceable effectively foreclosed further consideration of the attorney's fee issue unless the parties had agreed in writing to modify that provision of the agreement. See id.

Then, on March 11, 2010, once again and after the final hearing, in paragraph 3 of the decree of dissolution of marriage the trial court referenced the September 2009 order that found the premarital agreement to be “valid and enforceable.” Id. at 10. And the court did not mention the October 2008 agreed entry or find that it had modified the premarital agreement. Nonetheless, in paragraph 41, the court ordered Husband to pay \$5,500 of Wife’s attorney’s fees. That order is contrary to the terms of the premarital agreement, which the court reaffirmed in paragraph 3 of the same decree to be “valid and enforceable.” Id. at 10.

Accordingly, we conclude that the trial court erred as a matter of law when it ordered Husband to pay \$5,500 of Wife’s attorney’s fees. That part of the court’s order is contrary to the plain and unambiguous language of the parties’ premarital agreement and contrary to the court’s own unequivocal determination that the agreement is “valid and enforceable.” See id. at 10, 79. Further, there is no “written agreement of equal dignity” demonstrating that the parties agreed to modify their original agreement.¹ See id. at 38. Hence, we must reverse that part of the court’s order and remand with instructions that the trial court order the parties to pay their own attorney’s fees.

Reversed and remanded with instructions.

BAKER, J., and SHARPNACK, Sr.J., concur.

¹ At the final hearing the attorneys for the parties engaged the trial court in a brief colloquy concerning the payment of attorney’s fees. But that discussion does not satisfy the premarital agreement’s requirement for a “written agreement of equal dignity executed by both parties.” See Appellant’s App. at 38. And, again, the only writing signed by the parties was the agreed entry which did not modify the agreement but merely reserved the issue for future consideration.