

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-175

JUNE TERM, 2008

Le Borofsky	}	APPEALED FROM:
	}	
v.	}	Windham Family Court
	}	
David Dennis Cardill	}	DOCKET NO. F271-9-05 Wmdm

Trial Judge: Karen R. Carroll

In the above-entitled cause, the Clerk will enter:

Husband appeals the family court's ruling that the parties' prenuptial agreement is enforceable and thus controlling with respect to division of the parties' assets. We affirm.

Wife was born in Vietnam, emigrated to Canada as a child, and came to the United States when she was eighteen years old. She married and had two children. After she separated from her first husband, she obtained her G.E.D. and eventually earned a two-year accounting degree. She then began working for a communications firm doing accounting, project management, and general business oversight. As her salary increased, she began investing her money in real estate.

Husband, who is also from Canada, met wife when she was eighteen years old. He contacted her after she separated from her first husband in 1996. They began a relationship shortly thereafter. Husband had a background in geothermal heating and general construction. In 1998, he established a business to enable him to obtain a specialty visa for highly skilled Canadians. Defendant eventually established another business.

The parties married in March 2002. Before the marriage, at wife's insistence, they signed a prenuptial agreement providing that if they divorced, husband and wife would be entitled to all assets held in their respective names and would be responsible for all liabilities in their respective names. Wife filed for divorce in September 2005, three-and-one-half years after the parties were married. Both parties were represented by counsel. In June 2006, wife filed a motion in limine asking the family court to limit evidence on the division of marital assets and instead rely on the parties' prenuptial agreement. Husband objected to the motion, claiming that the agreement was not enforceable. On February 9, 2007, following a hearing on the motion, the family court issued a decision concluding that the prenuptial agreement was enforceable and

controlled the property division between the parties. Husband, now proceeding pro se, filed objections to a proposed final order. At the conclusion of another hearing on April 23, 2007, the court granted a final divorce after reaffirming that the prenuptial agreement was enforceable and concluding that the proposed order was consistent with the agreement. Husband appeals, arguing that the court erred by proceeding with the case before discovery was completed, by accepting wife's testimony, and by upholding the prenuptial agreement.

We find no merit to any of these arguments. Regarding husband's discovery argument, the parties exchanged discovery in the spring of 2006. Both parties, who were represented by counsel, filed motions to compel in June 2006, and the court granted those motions following a brief status conference on June 23, 2006. Thereafter, the parties submitted materials to each other. On August 28, 2006, husband's attorney filed a discovery certificate with the court indicating discovery was complete. Two days later, wife's attorney did the same. Husband produced additional discovery items three weeks later, but no other discovery was filed before the hearing on the motion in limine was held on November 6 and December 14, 2006. The court's entry order on December 14, 2006 stated that the evidence was closed and that the parties had twenty-one days to file post-trial legal memoranda. The court then issued its decision on the motion in limine on February 9, 2007. Following the decision, husband's attorney withdrew, and husband raised some objections to the proposed final order. At the April 23, 2007 hearing on those objections, husband contended that he had not received all the documents from wife that he had asked for, but the court determined that it was appropriate to enter a final order in accord with the prenuptial agreement.

Upon review of the record, we find no basis to disturb the family court's final judgment based on husband's claim of incomplete discovery. Both parties agreed before the hearing on the motion in limine that discovery was complete. Husband has not demonstrated, either before the family court at the April 23, 2007 hearing or in his appellate brief, that wife withheld documents relevant to the central issues in this case—whether the prenuptial agreement should be enforced, and, if so, which assets were held in her name. Accordingly, the court did not err in proceeding with the case and issuing a final divorce order. See LaMoria v. LaMoria, 171 Vt. 559, 560 (2000) (mem.) (holding that discovery rulings are within trial court's sound discretion and will not be disturbed on appeal absent showing of clear abuse or withholding of discretion).

We also reject husband's argument that the family court erred by not concluding that wife made misrepresentations in her testimony. Notwithstanding husband's claims to the contrary, nothing in the record demonstrates that wife gave fraudulent testimony. In fact, there was contradictory testimony, and it is within the province of the family court at the evidentiary hearing, not this Court on appeal, to determine the credibility of the witnesses and weigh the persuasiveness of the evidence. See Begins v. Begins, 168 Vt. 298, 301 (1998) (mem.). (noting that trial court is in unique position to assess credibility of witnesses and weigh evidence).

Finally, the record supports the family court's decision to uphold the parties' prenuptial agreement. Generally, prenuptial agreements are enforceable if: (1) each spouse made a fair disclosure of finances; (2) the agreement was entered into voluntarily; and (3) the substantive provisions of the agreement are not unconscionable. Bassler v. Bassler, 156 Vt. 353, 361 (1991). In this case, the court found that husband was aware of wife's finances and voluntarily entered into the agreement. The court also found that husband's claims of poverty were not credible, and

that the terms of the agreement—which merely awarded both parties assets in their names and made them responsible for debts in their names—is completely fair under the circumstances. Nothing in the record suggests otherwise.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice