STATE OF MICHIGAN

COURT OF APPEALS

HAROLD P. SANCHEZ,

Plaintiff/Counterdefendant-Appellee,

v

TERESA A. SANCHEZ,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
June 19, 2003

No. 234965
Saginaw Circuit Court
LC No. 99-030267-DM

Before: Fitzgerald, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce, asserting that the trial court erred in its property division and improperly denied her request for alimony and her request for attorney fees. We affirm.

The parties were married in 1986. In 1991, plaintiff was involved in an automobile collision that resulted in his total and permanent disability. Plaintiff received no-fault benefits including lost wages for three years plus an additional first-party no-fault settlement in the amount of $210,000 in December 1994. In 1995, plaintiff received a third-party settlement in the net amount of $1.2 million for his claims of pain and suffering and lost wages, as well as defendant's claim for loss of consortium. Approximately $430,000 was used to purchase furniture, vehicles, and real estate, to pay off the mortgage on the family home, and to purchase investments at Solomon Smith Barney. The balance of the settlement was used to purchase an annuity to provide future income to plaintiff.

At the time of trial, plaintiff was thirty-seven years of age and defendant was forty years of age. It appears from the materials submitted by the parties that plaintiff was awarded assets valued at approximately $438,500, while defendant received assets valued at approximately $206,000. Plaintiff was also awarded the future lump sum payments from the structured settlement totaling $166,788 to be paid in the years 2004 through 2010, as well as monthly annuity payments for seventeen years, social security disability payments, and a small pension from his former employer beginning at age sixty-five. In addition to the property award, defendant was given the exclusive right to reside in the marital home until the youngest child

reached nineteen years of age (a period of thirteen years, for which no monetary value was attributed in calculating the property awards above)[1]. She was also awarded weekly child support of $267[2] per week that plaintiff will have to pay out of his property award, and will receive $588 per month in social security disability benefits for the children.

Defendant first argues that the trial court made several erroneous factual determinations relative to the valuation and characterization of the parties' assets and that the ultimate property distribution was inequitable under the circumstances.

In reviewing a trial court's property division in a divorce, we must first review the trial court's findings of fact. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). The court's findings of fact will not be reversed unless they are clearly erroneous, i.e., we are left with the definite and firm conviction that a mistake has been made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); *Stoudemire v Stoudemire*, 248 Mich App 325, 336-337; 639 NW2d 274 (2001). If we uphold the court's findings of fact, we must then decide whether the dispositional ruling was fair and equitable in light of those facts. We will affirm the dispositional ruling unless left with the firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); *Stoudemire, supra* at 336-337; *Hagen v Hagen*, 202 Mich App 254, 258; 508 NW2d 196 (1993).

First, we reject defendant's claim that the trial court made a number of factual errors concerning the parties' marital property. Both the record below and the trial court's opinion clearly indicate that the court was aware that the parties' property included a monthly annuity from the settlement of a personal injury action, as well as an additional annuity held in the parties' investment accounts. We also conclude that the trial court did not clearly err by treating certain monies transferred to defendant's father as a loan rather than a gift. The nature of the transfer was a disputed matter at trial and we defer to the court's apparent decision to credit plaintiff's testimony on this issue. *Draggoo, supra*. However, because plaintiff does not dispute defendant's assertion that her father's outstanding repayment obligations should be disregarded in considering the overall property division, we treat the value of repayment by defendant's father as negligible for purposes of review.

Reviewing the property division itself, we are persuaded that it is equitable under the circumstances. The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002); *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). The division need not be mathematically equal, but any significant departure from congruence must be clearly explained. *Gates v Gates*, ___ Mich App ___; ___ NW2d ___ (#236158, rel'd 5/1/03) slip op p 1. To reach an equitable division, the trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each

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[1] Plaintiff therefore incurred costs to secure alternate living arrangements.

[2] The January 30, 2001, judgment of divorce ordered plaintiff to pay weekly child support of $171.38. In an order dated January 23, 2002, plaintiff was ordered to pay $267 per week for three children, $213 per week for two children, and $138 per week for one child.

party's station in life, each party's earning ability, each party's age, health and needs, fault or past misconduct, and any other equitable circumstance. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996); *Sparks v Sparks*, 440 Mich 141, 158-160; 485 NW2d 893 (1992); *McNamara, supra* at 185. The determination of relevant factors will vary with the circumstances of each case, and no one factor should be given undue weight.

In denying defendant's motion to amend the judgment, the trial court explained, in a supplemental opinion and order, the rationale for the property division:

> First, the bulk of the assets the parties are fighting over came into the marriage as a result of the personal injury settlement the Plaintiff received. The Defendant had a derivative claim in that action. A portion of this settlement would be for pain and suffering and not lost income, which would be unique to the injured party and not a marital asset.
>
> Second, and most important, the Defendant proved very convincingly that the Plaintiff, because of his health problems, could not supervise the children on a full time basis. . . . The Plaintiff is permanently disabled. This property division represents the majority of his income for the rest of his life. The Defendant has career skills that generate reasonable income. The issue of need clearly favors the Plaintiff.[3]

The personal injury action of one spouse, to the extent it represents pain and suffering rather than lost wages, is not marital property. *Lee v Lee,* 191 Mich App 73, 79; 477 NW2d 429 (1991). However, where the other spouse files a loss of consortium claim, the award for that claim is marital property. Here, the trial court's finding that the majority of the settlement in the personal injury suit was awarded for pain and suffering is not clearly erroneous. Additionally, a review of the record clearly supports the trial court's finding that plaintiff has greater needs based on his total and permanent disability and will be dependent upon his property award for his future income and needs. Defendant, on the other hand, is capable of earning at least $50,000 per year. The record establishes that the trial court took into consideration all of the relevant factors in reaching the property division, and we find that the division of the property is equitable under the circumstances. *McDougal*, *supra* at 89; *Sparks*, *supra* at 159.

Defendant also argues that the trial court erred by refusing to award her alimony. An award of alimony is within the trial court's discretion. *Demman v Demman*, 195 Mich App 109, 110; 489 NW2d 161 (1992). This Court reviews an alimony order de novo, but will not modify an award unless convinced that, had it been in the position of the trial court, it would have reached a different result. *Id.*

A court may award alimony in a divorce action to the extent it considers the award just and reasonable, after reviewing the ability of either party to pay, the character and situation of the parties, and all other circumstances in the case. *Id.* Among the relevant factors that should be considered by the court are the past relations and conduct of the parties, the length of the

[3] Defendant is a licensed dental hygienist and testified that she is capable of earning $25.00 per hour, or $1,000 for a forty-hour week.

marriage, the ability of the parties to work, the ages of the parties, the needs of the parties, the health of the parties, and general principles of equity. *Id*.

Again, it is undisputed that plaintiff is totally disabled and unable to work and that defendant's skills enable her to earn a wage of $25.00 per hour. Plaintiff was awarded the marital home for her exclusive use, and in addition was awarded assets totaling more than $200,000. She is also receiving weekly child support in the amount of $267, and receives social security disability benefits for the children in the amount of $588 per month. Under these circumstances, we are unable to conclude that we would have reached a different result had we been in the position of the trial court.

Lastly, defendant argues that the trial court erred by denying her request for attorney fees. We disagree.

In a divorce action, attorney fees are not recoverable as of right, but are "awarded only where necessary to preserve the party's ability to carry on or defend the action." *Stoudemire*, *supra* at 344; see also MCL 552.13(1); MCR 3.206(C)(2). Defendant argues that the trial court erred by refusing to award her at least $10,000 in attorney fees to offset the amount she had to borrow from her father. However, during trial, the court allowed each party to withdraw $10,000 from the parties' accounts to defray a portion of their attorney fees. When testifying regarding the amount her father paid on her behalf, defendant indicated that her remaining obligation to her father, after she sold some of her jewelry, was $10,000. Defendant does not discuss on appeal whether the amount withdrawn from the account went to satisfy this obligation or whether she owed additional amounts to her trial attorney. Defendant provides no additional information concerning the extent of her attorney fee obligations. Accordingly, she has failed to demonstrate that the trial court erred in failing to award her additional attorney fees pursuant to MCL 552.13.

In addition, although a large portion of the parties' dispute below concerned the custody of the parties' children, defendant has failed to allege facts to support her position that plaintiff unnecessarily prolonged the proceedings or acted unreasonably, so as to justify an award of attorney fees. See, e.g., *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). It is not sufficient for a party to simply announce a position or assert an error and then leave it to this Court to discover and rationalize the basis for the claim. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Thus, we affirm the trial court's decision regarding attorney fees.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

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HOEKSTRA, J., *(concurring in part; dissenting in part).*

I respectfully dissent because the property settlement in this case, in my opinion, is not fair and equitable.

Initially, I disagree with the statement in the majority opinion that "the trial court's finding that the majority of the settlement in the personal injury suit was awarded for pain and suffering is not clearly erroneous." The trial court's opinion only states that "a portion" of the settlement was to compensate plaintiff for pain and suffering. What portion was never determined and clearly the settlement was one to compensate their joint claims. On this record, unlike the majority, I find no basis to award plaintiff most of the settlement proceeds simply because plaintiff was the injured party.

Regarding the property settlement itself, it is indisputable that plaintiff was awarded a significantly larger portion of the parties assets. I agree that plaintiff's disability compared to defendant's work ability provides a reasonable basis for awarding plaintiff the monthly income from the Transamerica annuity. However, I believe that the other assets of the parties and, in particular, the marital home, the two vacant lakefront lots, the Salomon Smith Barney investment accounts and the two Transamerica annuities that are to be distributed by annual lump sum payments should have been divided equally.

Regarding the other issues raised on appeal, I join with the majority.

/s/ Joel P. Hoekstra