STATE OF MICHIGAN

COURT OF APPEALS

LILIANA KIRSCH,

Plaintiff-Appellee,

v

JESUS EDUARDO GONZALEZ,

Defendant-Appellant.

UNPUBLISHED
October 27, 2011

No. 304036
Oakland Circuit Court
Family Division
LC No. 2010-769743-DM

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Defendant, Jesus Eduardo Gonzalez (Gonzalez), appeals by right numerous provisions of his judgment of divorce, including the award of custody and the division of property. We affirm.

Gonzalez and his wife, plaintiff Liliana Kirsch (Kirsch), are both originally from Mexico but are naturalized citizens of the United States. The parties were married in Mexico on November 19, 1988, and are the parents of two children.[1] The parties began dating in 1982, were both employed, and began combining their incomes in joint financial accounts in 1985. A few months before their marriage, the parties jointly purchased one-half of a vacant lot in Mexico, on which they subsequently built a home that was completed in 1991. The parties acquired two additional vacant lots in 2002 and maintained joint bank accounts in Mexico throughout the marriage. At the time of trial, the home in Mexico was being leased with the rental payments deposited into the Mexican bank accounts. The parties obtained another residential property (hereinafter "the marital home") in Michigan. In addition to the real property, the parties had various items of personalty and multiple bank accounts at several financial institutions both in Mexico and the United States.

Gonzalez first challenges the trial court's distribution of the Mexican real property. Gonzalez contends that the property was his separate, premarital property and not subject to division in accordance with a prenuptial agreement that was contained in the parties' Mexican certificate of marriage and governed by Mexican law. We disagree.

[1] At the time of trial, the issue of custody involved only one minor child.

Prenuptial agreements are reviewed consistent with the standards applied to contracts. "[T]he interpretation of a contract is a question of law reviewed de novo on appeal, including whether the language of a contract is ambiguous and requires resolution by the trier of fact." *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005). A trial court's jurisdiction is a question of law that is also reviewed de novo. *WA Foote Mem Hosp v Dep't of Public Health*, 210 Mich App 516, 522; 534 NW2d 206 (1995).

Pursuant to MCL 600.1021(1)(a), "the family division of circuit court has sole and exclusive jurisdiction over . . . [c]ases of divorce and ancillary matters. . . ." "'"A divorce case is equitable in nature, and a court of equity molds its relief according to the character of the case; once a court of equity acquires jurisdiction, it will do what is necessary to accord complete equity and to conclude the controversy."'" *Draggoo v Draggoo*, 223 Mich App 415, 428; 566 NW2d 642 (1997) (citations omitted). Gonzalez does not dispute the trial court's authority to grant the divorce or suggest that the parties were not actually subject to the trial court's jurisdiction. Rather, he asserts that the trial court erred by determining that the various parcels of real property located in Mexico were subject to distribution and that they should have been governed by Mexican law, which would have required their preclusion from the marital estate because of the existence of the prenuptial agreement contained in the certificate of marriage.

In determining that the property in Mexico was a joint marital asset, the trial court heard testimony that the parties had been combining their earnings for several years before the marriage. Only a few months before their marriage, the parties purchased one-half of a vacant lot, on which a residence was erected after the marriage. The two vacant lots in Mexico were obtained four years after the marriage. The parties maintained joint Mexican bank accounts before and during the marriage. The parties jointly contributed to the maintenance and improvement of the properties and the proceeds from the rental of the Mexican residence were deposited in joint accounts. In light of these facts, the trial court determined that the Mexican properties were procured "with joint premarital funds that came from the earnings of both parties" and that the "property has been commingled with marital assets."

Typically, while martial assets are subject to division, the separate assets of the parties are not subject to invasion. *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002). Before dividing assets, a trial court is required to first distinguish between marital and separate assets. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). While marital assets are defined as those assets that a spouse earns during the course of the marriage, *Reed*, 265 Mich App at 152, "separate property" is defined as "property that a spouse owned before marriage or acquired during marriage by inheritance or by gift from a third party. . . ." Black's Law Dictionary (9th ed). A separate asset may be transformed into a joint asset due to commingling, which causes the asset to lose "any characteristic of being separate property." *Pickering v Pickering*, 268 Mich App 1, 12-13; 706 NW2d 835 (2005); see also *Cunningham v Cunningham*, 289 Mich App 195, 201; 795 NW2d 826 (2010).

The fact that the Mexican real property was titled exclusively in Gonzalez's name does not dictate the character of the property. Indeed, "[t]he mere fact that property may be held jointly or individually is not necessarily dispositive of whether the property is classified as separate or marital." *Id*. at 201-202. Only the lot that contains the residence in Mexico was purchased a few months before the marriage. The construction of the residence and the

procurement of the additional lots all occurred after the marriage. At most, the one lot constituted premarital property for a short period. Even though the one lot was purchased in Gonzalez's sole name shortly before the marriage, however, it was obtained with personal funds contributed by *both* parties. Improvements to the lot, including the construction of the residence and its maintenance, were all effectuated during the term of the marriage. The trial court properly determined that the lot and residence were sufficiently commingled to be construed as marital property.

This Court has addressed the role of prenuptial agreements in distributing property, stating:

> [I]t is now well established that prenuptial agreements governing the division of property in the event of a divorce are recognized in Michigan. But such agreements may be voided if certain standards of "'fairness'" are not satisfied. A prenuptial agreement may be voided (1) when obtained through fraud, duress, mistake, or misrepresentation or nondisclosure of material fact, (2) if it was unconscionable when executed, or (3) when the facts and circumstances are so changed since the agreement was executed that its enforcement would be unfair and unreasonable. A party challenging a prenuptial agreement "bears the burden of proof and persuasion." [*Reed*, 265 Mich App at 142-143 (citations omitted).]

This is consistent with the language of Article 211 of the Mexican civil code, provided by Gonzalez, which requires "agreements that establish the division of assets should always include an asset inventory of the assets owned by each spouse at the time of the marriage and a specified note of all debts each spouse has at the time of the marriage." There is no indication in the marriage certificate that such an "asset inventory" was made or provided, potentially invalidating that provision of the certificate, and Kirsch specifically denied the existence of any such disclosure. The evidence demonstrates that both parties contributed financially to the initial purchase of the lot. Gonzalez's claim that this constituted separate property is disingenuous given its procurement mere months before the marriage and the long history of the parties' joint involvement and contribution to its maintenance, development, and commingling of rents collected for the property. Article 207 of the Mexican civil code, also relied on by Gonzalez, recognizes that "[t]here could be division of assets based on agreements prior or during the marriage, by an agreement between the spouses or by judicial ruling. The division could include not only the assets that the parties own at the time of the marriage, but also [the] ones acquired after the fact." Based on the record before us, we cannot conclude that the trial court erred by determining that the various properties in Mexico were part of the marital estate and subject to distribution.

Gonzalez next asserts that the trial court failed to equitably divide the personal and real property of the parties. We disagree. "'In deciding a divorce action, the circuit court must make findings of fact and dispositional rulings.'" *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996) (citation omitted). The standard of review to be applied in matters pertaining to property distribution is twofold. Initially, this Court must review the factual findings of the trial court for clear error. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). Special deference is afforded to the trial court's credibility determinations. *Draggoo*, 223 Mich

App at 429. Next, this Court must determine if the dispositive ruling by the trial court was fair and equitable under the facts and circumstances of the case. *Sparks*, 440 Mich at 151-152. "The court's dispositional ruling should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *Pickering*, 268 Mich App at 7.

As discussed by this Court in *Berger v Berger*, 277 Mich App 700, 716-717; 747 NW2d 336 (2008) (citations omitted):

> The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. The trial court need not divide the marital estate into mathematically equal portions, but any significant departure from congruence must be clearly explained. Trial courts may consider the following factors in dividing the marital estate: (1) the duration of the marriage, (2) the contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life situation of the parties, (6) the necessities and circumstances of the parties, (7) the parties' earning abilities, (8) the parties' past relations and conduct, and (9) general principles of equity. When dividing marital property, a trial court may also consider additional factors that are relevant to a particular case. The trial court must consider all relevant factors but "not assign disproportionate weight to any one circumstance."

"An equitable distribution of marital assets means that they will be roughly congruent." *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

Gonzalez was awarded the marital home with sole responsibility for the mortgage, taxes, utilities, and insurance following the specified time period for Kirsch to vacate the residence. The parties stipulated that the marital home had a fair market value of $330,000. Proofs indicated that the outstanding mortgage indebtedness on the property was $333,004.54, resulting in a slight negative equity in the property. The other major assets included Gonzalez's pensions valued at $63,921.10, the Mexican properties valued at $445,704.98, and the bank accounts valued at $80,650.

Recognizing the difficulty in awarding any of the Mexican assets directly to Kirsch, as the properties were titled exclusively in Gonzalez's name, the trial court calculated the total value of the Mexican properties, bank accounts, and defined contribution at $590,276.08. The trial court then split these assets equally, indicating that Kirsch would receive $144,571 outright, representing an award of the bank account balances and defined contribution accounts. The trial court then awarded Kirsch "an additional $150,567.04 payable in a lump sum as part of the property division giving her a total of $295,138.04." In turn, Gonzalez was "awarded the Mexican property free and clear of any claim by Plaintiff, giving him property with a value of $295,138.04." In order to secure her judgment, Kirsch was granted a lien on the Mexican property in the amount of $194,145.72. She received an additional award of $20,988.68 to compensate "for the funds wrongfully removed or unaccounted for from their bank accounts" by Gonzalez during the pendency of the proceedings.

The resultant distribution of major assets owned by the parties was roughly congruent. *Jansen*, 205 Mich App at 171. The values of the real estate in Mexico, bank accounts, and

defined contribution accounts were equally divided between the parties. While Gonzalez was to retain the marital home with its existing debt, the evidence indicated that the fair market value of the home and outstanding debt were roughly equivalent. As such, Gonzalez would receive neither a significant gain nor loss on the property. The only additional monies awarded to Kirsch were attributable to funds not accounted for or returned by Gonzalez following his acknowledged violation of court orders precluding the removal of these funds from their respective accounts during the pendency of the proceedings. There is no evidence in the record to suggest that the property division served as a means for the trial court to improperly "punish" Gonzalez or attribute fault for the breakdown of the marital relationship. See *Berger*, 277 Mich App at 722; see also *Sands v Sands*, 442 Mich 30, 36-37; 497 NW2d 493 (1993). As the distribution of these assets was roughly equivalent, the award by the trial court cannot be construed as inequitable.

Gonzalez further asserts that the award of various items of personalty by the trial court was inequitable. In the lower court, only Kirsch set forth a proposed distribution for the items of personal property, which was not addressed or disputed by Gonzalez. Gonzalez makes only a bald, conclusory statement regarding the distribution of items of personal property and fails to indicate any values for the disputed items. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . nor may he give issues cursory treatment with little or no citation of supporting authority." *Houghton ex rel Johnson v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Id.* at 339-340. We note that a list of personal property and its distribution is attached to the judgment of divorce. While difficult to discern, this list suggests that the distribution of the delineated items was relatively fair. Both parties received certain musical instruments, computers, and television sets. Given Gonzalez's lack of specificity on this issue, we simply cannot say that the distribution of any of these items was inequitable.

Gonzalez also contests the award of spousal support to Kirsch for a ten-year period without any specification by the trial court of the conditions for early termination of the support. In general, to properly preserve an issue for appellate review, the issue must be raised before and decided by the lower court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). While the award of spousal support was properly preserved when it was raised before and ruled on by the trial court, the parties raised no issue regarding the length of the obligation or conditions for early termination. As such, the issues pertaining to the duration and early termination of the spousal support award are not properly preserved. This Court applies the same standard in reviewing an award of spousal support as is applicable to the division of marital property. *Berger*, 277 Mich App at 727. Specifically, the factual findings of the trial court are reviewed for clear error and the dispositional ruling is reviewed to determine whether it was fair and equitable given the circumstances and facts of the case. *Id*. Unpreserved issues are reviewed for clear error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Gonzalez does not challenge the award of spousal support or the specific amount of support. Rather, he alleges error by the trial court in failing to identify the conditions that would lead to an early termination of support, such as remarriage or cohabitation. We disagree.

There exist two recognized types of spousal support: periodic alimony and alimony in gross. *Staple v Staple*, 241 Mich App 562, 566; 616 NW2d 219 (2000). In general, periodic alimony is modifiable on a party's petition demonstrating a change in circumstances. MCL 552.28. With respect to periodic alimony, "if the installment payments are subject to any contingency, such as death or remarriage of a spouse, courts adhering to the bright-line approach hold that the payments are more in the nature of maintenance payments. . . ." *Staple*, 241 Mich App at 566. By contrast, alimony in gross is deemed to be exempt from MCL 552.28 and is, therefore, nonmodifiable. "If the alimony is either a lump sum or a definite sum to be paid in installments, the alimony provision is classified as alimony in gross. This term is somewhat misleading, because alimony in gross is not really alimony intended for the maintenance of a spouse, but rather is in the nature of a division of property. *Staple*, 241 Mich App at 566.

In the present case, the trial court indicated that the award of spousal support was "modifiable." While specifying only the termination of child support as "a consideration in any modification of spousal support," the trial court did not preclude the consideration of other factors such as remarriage, cohabitation, or other significant economic changes in a subsequent motion seeking an increase or reduction in support. There is no requirement that the trial court delineate specific factors to be considered for modification of an award of spousal support. The fact that the award of spousal support was specifically designated as modifiable permits either party to petition the court for alteration of the award upon a showing of sufficient factors. See MCL 552.28. The failure of the trial court to delineate the myriad of potential circumstances that might permit alteration of the award does not constitute error given the clear indication that the award was modifiable.

Regarding the ten-year duration of the award, we note that the trial court properly addressed the factors to be considered in an award of spousal support, which Gonzalez has not challenged on appeal. In awarding spousal support, the trial court focused on the income disparity between the parties, Kirsch's demonstrated "anticipated expenses," and the overriding objective of balancing "the incomes and needs of the parties so that neither will be impoverished." Given the considerations identified by the trial court, the length of the marriage, and Kirsch's health concerns, we cannot conclude that the award of spousal support for a ten-year period was excessive or in error.

Gonzalez also contends that the trial court erred in its award of attorney fees to Kirsch. We cannot agree. "In domestic relations cases, attorney fees are authorized by both statute, MCL 552.13, and court rule, MCR 3.206(C)." *Reed*, 265 Mich App at 164. "[A]ttorney fees are not recoverable as of right . . . . [and] may be awarded only when a party needs financial assistance to prosecute or defend the suit." *Id*. The trial court had two justifications for the award of attorney fees in this case. First, the court noted that Gonzalez had repeatedly violated its orders, necessitating Kirsch's filing of additional motions. Second, there existed a significant discrepancy in the current earning capacities of the parties. "It is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). This is particularly true where there exists a substantial discrepancy in the parties' respective incomes. *Id*. at 438-439. A "trial court's award of attorney fees should reflect the extent to which its award of spousal support leaves the parties with assets and income comparable to one another." *Id*. at 439. Kirsch had insufficient income for the payment of her attorney fees and incurred

additional attorney fees due to Gonzalez's repeated violation of court orders during the pendency of the proceedings. The trial court's decision to award attorney fees to Kirsch was not erroneous. *Kurz v Kurz*, 178 Mich App 284, 297-298; 443 NW2d 782 (1989).

Nor can we agree with Gonzalez that the trial court abused its discretion by allowing Kirsch to pay $20,000 toward her attorney fees from the parties' joint accounts. Contrary to Gonzalez's argument on appeal, this did not result in a duplicate or "double" payment of attorney fees on behalf of Kirsch. The record sufficiently establishes that Kirsch was in need of these funds to pay her legal expenses. We perceive no abuse of discretion in the trial court's decision to allow Kirsch to use $20,000 from the parties' joint accounts to pay a portion of her substantial attorney fees, especially in light of Kirsch's financial need and Gonzalez's conduct during the pendency of this case. MCR 3.206(C)(2); *Stallworth v Stallworth*, 275 Mich App 282, 288-289; 738 NW2d 264 (2007); *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993).

Gonzalez also challenges the trial court's ruling that required him to list Kirsch as a beneficiary on his life insurance. We find no error. The Judgment of Divorce contains a provision requiring Gonzalez to name Kirsch as a beneficiary on his current life insurance policies. This Court has previously determined that statutory authority exists to support the inclusion of such a provision. *Merchant v Merchant*, 130 Mich App 566, 574-576; 343 NW2d 620 (1983); see also MCL 522.27. Because a recognized statutory basis exists for the trial court's inclusion of the insurance beneficiary provision, Gonzalez's challenge is without merit.

Gonzalez further asserts that the trial judge should have been disqualified on the basis of bias and prejudice. Although Gonzalez filed a motion seeking disqualification in the lower court, he failed to seek review of the court's denial of his motion in accordance with MCR 2.003(D)(3). Accordingly, this issue is unpreserved. *Welch v Dist Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996). Unpreserved issues are reviewed for clear error affecting substantial rights. *Kern*, 240 Mich App at 336.

We perceive no actual judicial bias or prejudice in this case. See *Van Buren Twp v Garter Belt, Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003). The fact that the trial court may have praised Kirsh's counsel simply does not rise to the level of a showing of actual bias. Nor did the trial court's remarks concerning Gonzalez's efforts at self-representation demonstrate actual bias or prejudice. To the extent that Gonzalez asserts that the trial court's various rulings favorable to Kirsch constituted evidence of bias, we note that "[t]he mere fact that a judge ruled against a litigant . . . is not sufficient to require disqualification or reassignment." *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009).

Although Gonzalez also alleges on appeal that the trial court repeatedly threatened him with jail time, the record does not support these contentions and Gonzalez has failed to provide record citations to support this claim. It is axiomatic that a party may not "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Gonzalez's unspecific allegations are quite simply insufficient to demonstrate that he was entitled to judicial disqualification in this case. We perceive no error in this regard.

Finally, Gonzalez argues that the trial court erred by granting a divorce, as he contends that he still loves Kirsch and there has not been such a breakdown in the marital relationship that the bonds of matrimony have been destroyed. Michigan is a no fault divorce state. *Draggoo*, 223 Mich App at 424. It is the law of this state that "a divorce will be granted upon the request of only one of the original marrying parties, i.e., even over the objection of one of the marrying parties." *Id.* Specifically, MCL 552.6(3) provides that "[t]he court shall enter a judgment dissolving the bonds of matrimony if evidence is presented in open court that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved."

Kirsch alleged in her complaint that a breakdown of the marital relationship had occurred and that there was "no reasonable likelihood that the marriage can be preserved." Kirsch's testimony indicated the existence of verbal, physical, and emotional abuse by Gonzalez during the marriage. Kirsch also stated under oath that the allegations in her complaint remained true. Kirsch was specifically asked, "[I]f for any reason the Court would not grant the divorce, would you ever go back and live with Mr. Gonzalez as husband and wife?" She replied in the negative. She also denied any interest "in staying married to Mr. Gonzalez." Based on the evidence and testimony, the trial court did not err by determining that there had been "a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved." MCL 552.6(3); see also *Draggoo*, 223 Mich App at 424.[2]

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

[2] Gonzalez initially argued in his brief on appeal that the trial court had erred by awarding sole physical and legal custody of the parties' minor child to Kirsch. However, Gonzales stated at oral argument before this Court that the child would turn 18 years old in January and that he was no longer contesting the award of custody. Accordingly, we decline to consider the issue of custody further.