STATE OF MICHIGAN

COURT OF APPEALS

JANICE SHATZMAN,

Plaintiff-Appellee,

V

JERALD SHATZMAN,

Defendant-Appellant.

UNPUBLISHED
September 14, 2001

No. 222943
Oakland Circuit Court
Family Division
LC No. 95-498291-DM

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals by right a judgment of divorce, as modified on June 3, 1999. We affirm in part, reverse in part, and remand for further proceedings.

I. Facts and Procedural History

After a marriage of over twenty years, the parties' divorce trial began on February 1, 1996. Because the parties indicated an ability to settle some issues, trial was delayed pending settlement negotiations. The parties agreed to binding arbitration in certain areas. Arbitrator J. Robert Sterling was to ascertain and dispose of the chattel property of the marriage, and Joseph Cunningham was appointed "binding independent master" for purposes of fixing the values of the marital home and the parties' business-related interests.

Plaintiff prepared a judgment of divorce providing for an even division of the marital estate and moved for entry of the judgment. At a hearing on May 14, 1996, defendant stated that he wished to have Cunningham reevaluate certain numbers where the information provided was deficient. Defendant also objected that the judgment was not final because the question of fault had been reserved for future determination. Defendant agreed that sixty days was sufficient to review inaccuracies in the arbitrator's report. Defendant asked for provisions recognizing that Cunningham's work was subject to adjustment, and that the court was to decide whether a determination of the issue of fault should change the property distribution from an even split to a sixty-forty percent split favoring defendant. With those provisions included, the court entered the judgment.

On January 21, 1997, defendant moved to modify or set aside the independent master Cunningham's findings, reporting that Cunningham issued his final report on December 23,

1996, and asserting that it contained several errors. On May 9, 1997, the circuit court entered an order denying without prejudice the motion to set aside the "arbitrator's" award, "at this time."

This case was assigned to a new judge on December 19, 1997. Various negotiations, proceedings, and orders followed, but final resolution remained elusive. On May 5, 1999, the trial court held a hearing on the outstanding issues, after which it issued an order regarding defendant's motion for clarification and amending the judgment of divorce. The trial court ruled that the May 14, 1996, judgment was a final judgment, and that a year having passed since that time, all claims that could have been brought under a motion for modification were barred. The court further gave effect to that judgment's schedule and distribution of assets, as reflected in its Exhibit A, and declared that Cunningham's final report of December 26, 1996, was incorporated into the judgment. The court also dismissed with prejudice defendant's claims for the return of certain marital funds, and for reimbursement of household expenses on the ground that those issues were merged into and thus extinguished by the 1996 judgment.

The trial court denied defendant's motion for relief from judgment on September 1, 1999, and a motion to correct its June 3, 1999, opinion, in an order dated October 1, 1999. This appeal followed.[1]

II. 1996 Judgment

At the hearing on entry of the 1996 judgment, defendant objected on the grounds that the issue of fault had yet to be decided by the court, and that Cunningham was authorized only to decide the value of certain assets, not their allocation, and that some of his valuations were incorrect. On appeal, defendant argues that the May 14, 1996, judgment was flawed, because it presumed the existence of an agreement to which defendant never agreed as required by MCR 2.507(H), and because it failed fully to determine the property rights of the parties as required by MCR 3.211(B)(3).

A. MCR 2.507(H)

Defendant argues that the circuit court erred in incorporating into its judgment as a settlement a schedule of assets, their values, and their distributions, to which defendant had not in fact fully agreed as required by MCR 2.507(H). We agree. That rule provides as follows:

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[1] This Court denied defendant's application for leave to appeal the May 14, 1996, judgment in Docket No. 195296, because it was not persuaded of the need for immediate review. This Court later dismissed a claim of appeal from a June 11, 1998, order pertaining to this case (Docket No. 212807), because it did not dispose of all issues, and thus did not constitute the final judgment in the matter appealable by right. This Court initially dismissed a claim of appeal from the June 3, 1999, order, on the ground that the time that had passed since the May 14, 1996, judgment rendered the claim of appeal untimely, but, on reconsideration, this Court reinstated the claim of appeal. For present purposes, we regard the family court's June 3, 1999, order, which the court declined to clarify or modify in an order of October 1, 1999, as the order in this case that finally disposed of all claims of all parties.

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

In this case, defendant agreed in open court to have arbitrator Sterling decide the distribution of the chattel property of the marriage. Defendant has never challenged Sterling's work or renounced his agreement in that regard. Concerning independent master Cunningham, however, the record makes plain that defendant agreed only to have Cunningham determine the value of the parties' real property and business interests. Defendant did not agree to have an arbitrator or master allocate the latter assets as part of the property division. And, in fact, per his own admission, Cunningham's figures were meant to be estimates.

The 1996 judgment incorporates its exhibit A as "the property divisions and settlement agreement of the parties," that exhibit in turn incorporated Cunningham's "estimates," the judgment's exhibit B. At the hearing on the proposed judgment, defendant did not dispute any part of exhibit A's schedule apportioning the marital estate. He did, however, dispute the accuracy of Cunningham's figures included within it, and the allocation of those assets whose values Cunningham had estimated.

The record confirms that defendant agreed to have Cunningham determine the values of certain assets, but that he specifically declined to have any of those business interests factored into the final settlement as marital property. For that reason, and because Cunningham's figures were, at defendant's behest but with the plaintiff's and the circuit court's agreement, left subject to future adjustment, the judgment erroneously announces that it reflects the agreement of the parties. The requirements of MCR 2.507(H) were not satisfied for purposes of enforcing against defendant the schedule of allocations contained within the judgment insofar as Cunningham's estimates are incorporated therein.

B. MCR 3.211(B)

We agree also with defendant's assertion that the 1996 judgment did not fully determine the parties' property rights, as required by court rule.[2]

The rules clearly envision a trial court's retaining of jurisdiction over a divorce case for purposes of future modification of the judgment, concerning spousal support, MCR 3.211(B)(4), or child custody and support, MCR 3.211(C)-(E), but not for property distribution. Indeed, MCR 3.211(B) states, "A judgment of divorce . . . must include . . . (3) a determination of the property rights of the parties . . . ." That determination is among the "mandatory requirements" of a valid divorce judgment. *Yeo v Yeo*, 214 Mich App 598, 601; 543 NW2d 62 (1995). Accordingly, reversal is warranted where a trial court bifurcates the proceedings by granting a divorce judgment that reserves the division of property for future determination. *Id.* at 600, 602.

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[2] The parties agree that child custody and spousal support are not issues.

In this case, defendant had asserted that plaintiff was at fault for the failure of the marriage, and that this should affect the property division. Plaintiff was advocating an equal distribution of marital property, whereas defendant sought a sixty-forty split. On February 2, 1996, when the parties announced their agreement to submit certain issues to arbitration, the following exchange occurred:

> THE COURT: As to any other matters—just so I understand, as to any other matters that would be under the jurisdiction of the Court, and as these—both domestic lawyers are familiar with, the Court will have no longer involvement in them, other than to approve whatever either Mr. Sterling or this other person [Cunningham] approves?
>
> [COUNSEL FOR DEFENDANT]: Your Honor, the only other question then becomes one for the Court to retain jurisdiction . . . is that once that the arbitrator has determined the total value of the marital estate, if the parties cannot then take a percentage division of that estate, that the Court would then be given the opportunity to make that ruling. All the arbitrator . . . .
>
> THE COURT: (Interposing) Counsel, I'm not quite sure. The Court will then decide as to the marital value, the marital estate, I'll decide if it should be divided fifty-fifty, sixty-forty?
>
> [COUNSEL FOR DEFENDANT]: That's right. That's exactly right, that's it. That's the only part the Court's got left in the case, your Honor.
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> * * *
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> [COUNSEL FOR PLAINTIFF]: I have no problem with that, your Honor.
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> * * *
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> THE COURT: The only problem I have with that, is that this case will be ongoing indefinitely.
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> * * *
>
> . . . [D]o you want me to set it for the trial . . . with the only issue to be decided on the split of whatever it is—fifty/fifty or sixty/forty?
>
> [COUNSEL FOR DEFENDANT]: That's correct, Judge.
>
> [COUNSEL FOR PLAINTIFF]: Or forty-five . . . .
>
> THE COURT: (Interposing) And the only issue I will have to do that determination is fault?
>
> [COUNSEL FOR DEFENDANT]: That's it.

The court then requested a proposed judgment "for me to sign in ten days with all things provided, except for that one paragraph that says fifty-fifty or sixty-forty."

Exhibit B of the 1996 judgment is a letter Cunningham prepared in which he reported on "arbitration proceedings to determine the estimated values" of the parties' business interests, citing additional documents he prepared, those estimates in turn being incorporated into the judgment's exhibit A, setting forth a detailed division of marital property. The judgment further provides that "it is acknowledged and understood by the parties that the division of those assets valued and cited by Binding Arbitrator Joseph Cunningham . . . are subject to the Binding Arbitrator's adjustment." The last paragraph of the judgment provides as follows:

> **IT IS FURTHER ORDERED AND ADJUDGED** that this Court shall retain jurisdiction to alter or amend distribution of the assets set forth herein in the property division agreement attached hereto as Exhibit A based upon revisions pursuant to the report of Binding Arbitrator Joseph Cunningham or otherwise based upon the Court's determination that incidence of fault may require a distribution other than that set forth in Exhibit A.

The judgment thus reflects the circuit court's posture that the property division was subject to further litigation.

"Compliance with MCR 3.211(B)(3) ensures that divorce cases are not tried piecemeal subjecting the parties to a multiplicity of orders that could be appealed." *Yeo, supra* at 601. What MCR 3.211(B)(3) attempts to avoid is precisely what has happened in this case. The paragraph quoted above clearly indicates that division of the marital property was not fully determined.

Plaintiff argues that the order's acknowledgment that arbitration was pending on certain issues and that the issue of fault might warrant modification of the property division, does not indicate that the order did not dispose of all the property. Instead, it states that the court respected the binding arbitration as it related to issues that were not for the court itself to decide, and that defendant might be entitled to some post-judgment relief over the issue of fault. Plaintiff suggests that further litigation on the fault issue is akin to moving for a new trial.

However, proceedings for post-judgment relief are different from trial of original issues. Indeed, strictures against liberal granting of post-judgment relief exist to underscore and respect the presumptive finality of judgments. Thus, in a civil case, a motion for a new trial should be granted only where substantial rights are materially affected by irregularities in the proceedings, misconduct of a party, excessive, inadequate, or insupportable verdict or damages, new material evidence, or error of law. MCR 2.611(A)(1). Thus, proving, and advocating pursuant to the issue of fault on a preponderance of the evidence at trial, presents a much less onerous task than persuading a court to grant post-judgment relief on that basis. The "mandatory" requirement for final determination of the parties' property rights is hardly satisfied if property issues ordinarily decided at trial may simply be omitted from the judgment but left for trial and decision in post-judgment proceedings.

Similarly, a judgment that incorporates an arbitrator's findings and conclusions should reference those specific, completed, findings and conclusions. A judgment that incorporates an arbitrator's decision still in progress on property matters fails to determine the parties' property rights. A judgment that leaves the property distribution for later resolution violates MCR 3.211(B)(3), as construed in *Yeo, supra* at 600-602.

Because it reserved for later determination the final adjudication of certain property issues, the May 14, 1996, judgment should not have been entered. Moreover, it should not have been treated as a final judgment with respect to those pending issues in the proceedings that followed. Thus, defendant was prejudiced from having what was not truly a final judgment treated as a limitation on his ability to litigate further those issues unresolved by the 1996 judgment. Consequently, reversal and remand are required on any issues that were not properly subject to or which were not contemplated by arbitration.

III. Arbitration

The family court division of the circuit court declined to entertain defendant's objections to Cunningham's work out of deference to the 1996 judgment and deemed defendant's continuing agitation as untimely. On the other hand, the circuit court indicated that the issue was alive and subject to further litigation. The family court division's deference to the 1996 judgment, which by its own terms was not final with regard to Cunningham's figures, and where the court had remained open to further development of that issue, was error. This is an instance where defendant was prejudiced by having what was in fact a non-final order enforced against him as a final one.

Plaintiff points out that defendant initially challenged only whether the judgment reflected a proper settlement agreement and whether it improperly left certain property issues for later adjudication; consequently defendant forfeited this issue. However, defendant's disputing Cunningham's figures was the basis for those objections initially raised. When the court reserved for later resolution that question, it invited additional development of the issue, as defendant's inquiry into Cunningham's procedures raised additional concerns. This matter was neither decided nor forfeited below.

Defendant argues extensively on appeal that Cunningham's arbitration work was procedurally improper and substantively erroneous. The order appointing Cunningham, however, designated him as a "binding independent master," not an arbitrator. The same order, on the other hand, appointed Sterling an arbitrator. The hurdle for setting aside an arbitration award is high. But in the instant case, the arguments respecting arbitration in regards to Cunningham's figures is misplaced. Despite, both the parties' and the court's reference at times to Cunningham as an arbitrator, he was not. Only Sterling was an arbitrator, and his findings and conclusions are not at issue. A court speaks through its orders, and the relevant order on this matter is unequivocal. This Court can only surmise that Cunningham was in essence an expert agreed upon by both parties to calculate the values of certain assets. The trial court retained at all times the authority to accept or reject Cunningham's figures, and defendant clearly retained his right to object to them as well. Thus, it would be improper for this Court to decide a factual question that was not adjudicated below. For these reasons, remand is appropriate to allow defendant to present his objections to Cunningham's report.

IV. Merger

As discussed above, although defendant raised the issue of marital fault before the circuit court, the court never decided the issue, deferring to the parties' various settlement negotiations. Defendant also had filed claims in the circuit court alleging that plaintiff had improperly withdrawn $60,000 in marital funds, and that plaintiff owed defendant over $13,000 for reimbursement of household expenses. The trial court also did not specifically decide these two issues. When defendant raised these three issues before the family court division of the circuit court, the court declined to decide them on the ground that those claims had all been merged into, and thus extinguished by, the 1996 judgment.

"'If a judgment is rendered in favor of the plaintiff, the cause of action upon which the judgment is based is merged in the judgment, and the plaintiff cannot thereafter maintain an action on the original cause of action.'" *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 42; 191 NW2d 313 (1971), quoting and adopting Restatement Judgments, § 68 at 293, 294. Thus, where a final judgment has been rendered, all related claims, pleaded or not, are merged into that judgment and extinguished by it, barring further litigation of such claims. See *Schuhardt v Jensen*, 11 Mich App 19, 22-23; 160 NW2d 590 (1968). Defendant now brings these issues on appeal.

A. Fault

Plaintiff points out that the circuit court initially decided that the issue of fault should be tried within sixty days of the May 14, 1996, judgment and argues that defendant's failure to see that this was done constituted a waiver of the issue. However, trial never took place, on that or other matters, as the parties continued to try to settle their outstanding issues. At the April 23, 1997, motion hearing, both plaintiff and the circuit court recognized that the issue of fault was still pending, and both expected it to be resolved at trial at some future date.

Finally, the court stated, "I'm not going to consider the fault issue. . . . We're not going to have *another* trial on this matter" (emphasis added), thus implying that the 1996 judgment covered that issue. In fact, the matter of fault was neither tried nor abandoned. Remand is also appropriate to resolve that issue.

B. Cash Withdrawals

In the early stages of this litigation, the circuit court entered an order preserving marital assets and maintaining the status quo, prohibiting the parties from "disposing of or encumbering any of the marital assets . . . including . . . cash, savings accounts, checking accounts . . . without the prior order of the Court; provided the parties may withdraw funds from their personal accounts in the ordinary course of business." A few months later, defendant moved for return of marital funds, alleging that plaintiff had removed $60,000 from family accounts in violation of that order. The circuit court made no ruling on this specific motion. However, Exhibit A of the May 14, 1996, judgment, put forward as a settlement reflecting the decisions of the two arbitrators, included a disposition of the parties' savings and checking accounts, among other financial assets. In addition to resisting entry of the judgment generally because it was not a final one, defendant specifically challenged this schedule of assets and distribution on two grounds:

that a determination of fault may require a different division, and that arbitrator Cunningham's valuations of the marital home and two business interests were inaccurate. Defendant did not at that time clamor for further litigation of the issue of return of marital funds and did not again raise the issue until it came before the family division of the court, which took over the case.

Because Cunningham did not address the matter of marital cash, and because the marital cash is otherwise disposed of in the schedule appended to the 1996 judgment, the specific issue of plaintiff's alleged withdrawal of $60,000 in marital money was folded into that schedule, subject only to possible modification on the basis of a determination of fault. In other words, the undisputed part of the binding arbitration that took place accounted for, or otherwise resolved claims attendant to, the $60,000 in question. Thus, that issue was indeed subsumed into the 1996 judgment, even though that judgment was imperfect in respects not bearing on this specific claim.

C. Household Expenses

The parties agreed that while they both continued to reside in the marital home, they would share equally in the expenses of maintaining the home and rearing their two children. An interim order of the circuit court, dated March 13, 1996, formalized that understanding. An order entered May 7, 1996, in response to plaintiff's motion "for compliance with the Order of this Court dated March 13, 1996," required defendant to pay plaintiff $3,600 in reimbursement for funds spent and states that it "is without prejudice to the Plaintiff submitting to the Defendant proof of additional costs that may have been incurred during the relevant period." The May 14, 1996 judgment includes the provision, "During the period Defendant remains in the marital residence before vacating the said premises, Defendant shall . . . pay one-half of all costs of maintaining the marital residence, including . . . one-half of all costs and expenditures related to the minor children of the parties." On June 12, 1996, plaintiff requested an additional $4,498.39 in reimbursement of household and child-care expenses. Then, on July 18, 1996, defendant moved for a setoff for medical expenses, alleging that defendant had asked plaintiff for reimbursement of $13,298.45 in expenses and asking the court to apply that figure to any arrearage defendant owed. Although the circuit court set a trial date of October 18, 1996, to decide these claims, litigation of this issue was perpetually delayed while the parties unsuccessfully attempted to settle.

Nonetheless, it is clear that the issue of household expenses remained alive after entry of the May 14, 1996, judgment. The judgment specifically provided that the parties would share certain expenses equally and included a provision announcing that the circuit court was retaining jurisdiction in order to "enforce the executory terms of this Judgment . . . and the terms of the Settlement Agreement." The provision further stated, "Either party may petition the Court for such relief as may be appropriate upon the failure of the other party to cooperate in effectuating the terms of this Judgment . . . ." Because the equal division of household and child-care expenses was part of that judgment, the litigation attendant to that provision was a matter of enforcing the judgment. The trial court thus erred in refusing to visit that issue on the ground that it had been merged into that judgment. This is another issue to be resolved on remand.

V. Judgment Interest

At the May 5, 1999, hearing before the trial court, the court announced that it would incorporate arbitrator Cunningham's valuations from his December 26, 1996, report into the judgment. The court then allowed the values of retirement accounts to be adjusted to reflect present-day values. When defendant requested upward adjustments on funds that plaintiff owed him, the court refused to award interest covering the time Cunningham tendered his final figures to the present. The court explained, "ordinarily I would assess interest but this matter has been litigated now for three years by [defendant]. It's not [plaintiff's] fault that the matter has dragged on for all of this time."

In a divorce case, a court's equitable powers include the discretion to award interest on a money judgment. *Reigle v Reigle*, 189 Mich App 386, 392-393; 474 NW2d 297 (1991). We review a court's decision on a request for such interest for an abuse of discretion. *Id.* at 393.

In this case, although the record definitely suggests that the proceedings below were drawn out, and sometimes gratuitously so, it does not obviously reveal defendant as the main offender. Indeed, the trial court in this instance may well have had little regard for some of defendant's issues upon which defendant has earned appellate relief. On remand, the trial court should entertain again the question of interest on funds owed to defendant and should explain the factual basis for its decision.

VI. Conclusion

The May 14, 1996, judgment as modified by the trial court on June 11, 1999, remains in force and precludes further litigation of the matters covered therein, except in the following particulars to be resolved on remand: Defendant is to be given a reasonable opportunity to present objections to the factual conclusions reached by arbitrator Cunningham and/or to set aside the arbitration. Once the values of the marital home and the parties' business interests are decided either by rearbitration or the court's conclusions, the allocation of those interests must either be settled by the parties or decided by the court. The trial court should likewise take evidence and decide the issues of defendant's claim for reimbursement of household expenses and fault for breakdown of the marriage and whether marital fault should affect the property division, unless these issues are settled on the record.

Further, if the issue of judgment interest arises on remand, the court should articulate on the record its reasons for its decision in sufficient detail to allow for appellate review. We see no need for a different judge to be assigned on remand. Consequently, we decline that request.[3]

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[3] On the eve of oral argument, defendant moved to add this issue for appeal. We deny this motion and that for immediate consideration.

We affirm in part, reverse in part, and remand for further proceedings. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

I concur in result only.

/s/ Hilda R. Gage