STATE OF MICHIGAN

COURT OF APPEALS

DIANA J. RAJCOVSKI,

Plaintiff-Appellee,

v

BOSKO RAJCOVSKI,

Defendant-Appellant.

UNPUBLISHED
July 10, 2003

No. 238042
Macomb Circuit Court
LC No. 99-001608-DM

Before: Cooper, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court's judgment of divorce. We affirm.

In a divorce action, a trial court is required to make factual findings and dispositional rulings. On appeal, we review a trial court's factual findings for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding is clearly erroneous if, after a review of the record, this Court is firmly convinced that a mistake has been made. *Moore v Moore*, 242 Mich App 652, 654-655; 619 NW2d 723 (2000). If the trial court's findings of fact are not clearly erroneous, we then must decide whether the dispositive ruling was fair and equitable in light of those facts. *Id*. at 655. A dispositional ruling is discretionary and should be upheld unless this Court is convinced that the division was inequitable under the circumstances. *Dragoo v Dragoo*, 223 Mich App 415, 429-430; 566 NW2d 642 (1997).

I. Property Division

Defendant initially argues that the trial court made several erroneous factual findings that resulted in an inequitable distribution of the marital property. We disagree.

To the extent that they are relevant, a trial court must consider the following factors when dividing marital property:

> (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. [*Sparks, supra* at 159-160.]

A. The Parties' Health

Defendant asserts that the trial court erred in finding that both parties are "basically healthy." Rather, defendant asserts that the evidence clearly established that he is disabled from employment as a result of a car accident in January of 1998. Defendant claims that this disability forced him into early retirement from his job at Chrysler. He further notes that he was certified as "disabled" by the Social Security Administration. Nevertheless, at trial defendant's own primary care physician, Dr. Dushan Nestor, discounted the majority of defendant's ailments. Indeed, defendant informed Dr. Nestor, during a physical examination in June 2000, that he was not suffering from any of the conditions he complained of at trial. Defendant's contention that he was permanently disabled from employment was also questionable given the fact that he continued to run his radio show, and its related entities, for more than a year after the car accident. We further note that defendant published a book and embarked on a book tour during the divorce proceedings. Thus, we find no clear error with the trial court's findings in this regard.

B. The Parties' Life Status

Defendant next argues that the trial court made inaccurate factual findings concerning the parties' life status. In its opinion, the trial court described the parties as follows:

> Defendant began work with Chrysler as a machine operator in 1966 and retired in 1998. Plaintiff has an eighth grade Macedonian education. Plaintiff worked on and off for brief periods during the marriage at jobs requiring unskilled labor. Plaintiff mainly tended to all the needs of the family, including cooking, cleaning and childcare. In addition, defendant also operated and hosted a weekly Macedonian-language radio show . . . . Part of that endeavor included organizing and putting on Macedonian concerts, the annual Miss Macedonia beauty pageant, dances, and the like. Plaintiff recorded commercials for the show, helped with the social activities such as driving defendant to out of town concert venues and did some of the office work.

Defendant has failed to present any evidence that these findings were erroneous.

Moreover, we find no merit to defendant's claim that the trial court improperly imputed an annual income of $50,000 to defendant for his radio program and related activities. There was a dispute between the parties concerning whether the radio show in question was merely a hobby or a profit-making venture. Plaintiff's expert, Mr. Joseph Cunningham, a certified public accountant with Plante and Moran, was hired to determine the amount of plaintiff and defendant's total income for the years 1969 through 1999, minus living expenses. These figures were based on approximately one-third of defendant's tax returns over this time frame, documents provided by plaintiff, and interviews with plaintiff. According to Mr. Cunningham, the information he obtained indicated that defendant operated the radio show as a business. He testified that advertisers would pay approximately $50-$75 per advertisement and that the show charged $25 for special dedications.[1] He further stated that defendant hosted approximately

[1] Mr. Cunningham estimated that the show generated $93,750 per year in advertising revenue (continued…)

twenty concerts a year, wherein revenue was generated through admission fees, advertisement fliers, the sale of food and beverages, and the sale of tapes and compact discs.[2]

Conversely, defendant's expert, Mr. Ted Funke, described defendant's radio program, and its related ventures, as a hobby that was not operated with a profit motive. Mr. Funke testified that the radio program had no value as a business. Mr. Funke based his findings on interviews with defendant and a review of the report prepared by plaintiff's expert.

In its opinion, the trial court found the assertions of plaintiff's expert regarding the purpose of the radio show to be more credible. It further determined that defendant's decision to end the radio show was motivated by a desire to gain an advantage in the divorce proceedings rather than any disability. On appeal, due regard is afforded "to the trial court's superior opportunity and ability to judge the credibility of witnesses." *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998); *Everett v Everett*, 195 Mich App 50, 52; 489 NW2d 111 (1992). Moreover, the trial court accounted for the disparity between the experts' valuations of the radio program by imputing a lower income than plaintiff requested.[3] Accordingly, we hold that the trial court's findings in this regard were not clearly erroneous.

C. Marital Estate

Defendant also opines that the trial court erroneously included portions of defendant's separate assets as part of the marital estate. After reviewing the record, we find no merit to this claim. When dividing property in divorce proceedings, the trial court has a duty to determine which assets are marital and which are separate. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). As a general rule, "each party takes away from the marriage that party's own separate estate with no invasion by the other party." *Id.*

1. Liquid Assets

Defendant contends that $124,500 was improperly included by the trial court as part of the marital estate because the money originated from his relatives. Defendant maintains that the evidence clearly shows that this money came from an account that was held jointly by his sister, brother-in-law, and uncle. However, defendant's expert could not discern the original source of the funds in this joint account. Plaintiff provided evidence that prior to her husband's receipt of the $124,500, defendant wrote a check to his brother-in-law in the amount of $10,000. Plaintiff also testified that defendant's uncle was impecunious.

The record indicated that defendant regularly shared bank accounts with his family and co-mingled the parties' money with his relatives' money. For instance, defendant deposited his

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(…continued)

from 1991 to 1999

[2] We note that defendant claimed the tapes and compact discs were given out for free.

[3] We note the trial court's comment that plaintiff's efforts to place a value on the profits from the radio station were "greatly hampered" by defendant's failure to provide the appropriate documentation during discovery.

paychecks and radio program revenues into his relatives' bank accounts. There was also evidence that interest from some of the parties' investments was deposited into his relative's accounts. Consequently, the trial court did not clearly err in finding that the two cashier's checks totaling $124,500 were marital assets.

2. Payments for Temple Residence

Likewise, the trial court did not err in failing to specifically exclude the $44,483 down payment defendant made on the marital home, or the $22,987 that was used to pay off the mortgage, from the marital estate. While defendant asserts that the money for the down payment came from his parents, plaintiff insists that she and defendant generated the funds. Indeed, the evidence shows that the down payment was drawn on a bank account that defendant held jointly with his parents. Given defendant's propensity to co-mingle the parties' money with other family members, we are not convinced that the trial court clearly erred in holding that the funds used in the down payment were marital assets.

3. Arbitration Award

Defendant further purports that the $61,666 pain and suffering portion of his arbitration award that he received as a result of his automobile accident was erroneously included as part of the marital estate. While "an award of damages for pain and suffering . . . is the injured party's separate property, it is, at the trial court's discretion, available for distribution as a marital asset in a divorce proceeding in order to make a fair and equitable division of property." *Stoudemire v Stoudemire*, 248 Mich App 325, 339; 639 NW2d 274 (2001); see also *Sands v Sands*, 442 Mich 30, 36; 497 NW2d 493 (1993).

In October 1999, defendant was awarded $92,500, plus attorney fees and costs, for the injuries he sustained in the car accident. Defendant deposited the entire arbitration award into a new bank account the following January but neglected to list this account as an asset in the divorce proceedings. Indeed, this account was not discovered until shortly before trial. At that time, defendant alleged that he used all of the funds in the account to repay loans that he allegedly borrowed to cover the parties' living expenses. The trial court determined that defendant concealed the award and found defendant's explanation that the money was used to repay loans for the family incredible. See *Everett*, *supra* at 52. Under the circumstances, the trial court's decision to include the entire arbitration award as a marital asset was not improper or clearly erroneous.

4. Macedonia Apartment

Defendant also asserts that the apartment in Macedonian, valued at $22,000, should not have been included as part of the marital estate because it was purchased by defendant's mother. At trial, defendant provided a tax record that identified his mother as the apartment's owner and taxpayer. Conversely, plaintiff testified that the parties built and paid for the apartment in 1984. She further stated that her name was on the door of the apartment and that the electric bills were in her name. Defendant failed to produce a title or deed naming his parents as owners. Moreover, defendant admitted that his parents never lived in the apartment, despite the fact that they allegedly purchased it as a winter home. Rather, defendant acknowledged that the only people to stay at the apartment included himself and his children. We further note that the taxes

on the apartment continued to be paid after the demise of defendant's mother. Consequently, we find that the trial court did not clearly err in concluding that the Macedonian apartment was a marital asset.

II. Failure to Make Factual Findings in Property Division.

Defendant next contends that the trial court erred by not making specific findings on certain factors relevant to the marital property distribution. Defendant claims that the trial court failed to make the required findings on the parties' ages, the necessities and circumstances of the parties, and general equity principles. However, a review of the record reveals that defendant's contentions are baseless. Indeed, the trial court specifically noted the parties' ages at the time of their marriage and made specific findings concerning their circumstances at the time of the divorce. It further appears that the trial court considered general equity principles.

III. Pension & Social Security Benefits

Defendant next contends that the trial court erroneously awarded plaintiff fifty percent of his pension and social security benefits. Specifically, defendant claims that because he was married to plaintiff for only twenty-six of the thirty-three years he worked at Chrysler, the trial court was required to reduce the award accordingly. However, a trial court may consider pension benefits that accrued before marriage as part of the marital estate subject to division "if such treatment is 'just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.'" *Booth v Booth*, 194 Mich App 284, 291; 486 NW2d 116 (1992), quoting MCL 552.23(1). In this case, the trial court noted that plaintiff had only an eighth grade education and limited employment experience in unskilled labor. The trial court further indicated that defendant was able to operate the radio show and that he was not disabled from employment. Accordingly, we find no clear error.

To the extent defendant claims that the trial court improperly awarded fifty percent of his social security benefits to plaintiff, we note that he failed to properly present this argument on appeal because he did not cite any authority in support of his position. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Houghton v Keller*, 256 Mich App 336, 339-340; ___ NW2d ___ (2003).

V. Spousal Support

Defendant further claims that the trial court erred in awarding plaintiff spousal support. The main purpose of awarding spousal support is to balance the incomes and needs of the parties without impoverishing either party. *Moore, supra* at 654. According to *Demman v Demman*, 195 Mich App 109, 110-111; 489 NW2d 161 (1992):

> A court may award alimony in a divorce action "as it considers just and reasonable," after considering the ability of either party to pay, the character and situation of the parties, and all other circumstances in the case. Several relevant factors should be considered by the court, including, but not limited to, the past relations and conduct of the parties, the length of the 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. In addition, a party's fault in causing the divorce is a valid consideration in awarding alimony. [Citations omitted.]

Essentially, a trial court must make a determination of spousal support that "is just and reasonable under the circumstances of the case." *Moore, supra* at 654.

Contrary to defendant's assertions on appeal, the trial court made the appropriate factual findings when it awarded plaintiff spousal support in the amount of $125 per week. See *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993). Indeed, the trial court noted the parties' ages, ability to work, health, and the length of their marriage. While the trial court made no specific findings concerning defendant's ability to pay, it found that he made an annual income of approximately $50,000 per year through his radio program.[4] Further, the trial court made the award temporary, pending the distribution of defendant's pension and social security benefits.

We further find no merit to defendant's claim that spousal support was improper given the fact that plaintiff failed to specifically request it in her complaint. Pursuant to MCR 3.206(A)(6), "[a] party who requests spousal support in an action for divorce . . . must allege facts sufficient to show a need for such support and that the other party is able to pay." Notably, the court rule does not state that a specific request for spousal support must be made in the complaint. In her complaint, plaintiff alleged that defendant earned a net income of $5,000 per month and that he maintained exclusive control over the parties' bank accounts, stocks, bonds, mutual funds and pensions. Plaintiff further claimed that she had insufficient funds to bear the expense of the divorce action. Thus, it appears to this Court that plaintiff alleged sufficient facts in the complaint to evidence a need for support.

VI. Attorney Fees

Defendant ultimately contests the trial court's award of $25,000 in attorney fees to plaintiff. However, this issue was not properly preserved for appeal given defendant's failure to object below. See *Jansen v Jansen*, 205 Mich App 169, 173; 517 NW2d 275 (1994). Unpreserved errors are not reviewed on appeal absent a showing that manifest injustice would result. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Nonetheless, we note that attorney fees are appropriate when the requesting party incurred them as a result of the other party's unreasonable conduct during the course of the litigation. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). There was evidence in this case that defendant's

[4] We note that a party's voluntary reduction in income may be considered when determining spousal support. *Moore, supra* at 655

behavior was particularly unreasonable during discovery and that he failed to provide plaintiff's expert with the necessary business records to assist in the valuation of defendant's assets.

Affirmed.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ William B. Murphy