

STATE OF MICHIGAN
COURT OF APPEALS

CONNIE L. SCHEPPELMANN,
Plaintiff-Appellant,

v

DANIEL L. SCHEPPELMANN,
Defendant-Appellee.

UNPUBLISHED
September 13, 2007

No. 265809
Manistee Circuit Court
LC No. 99-009331-DO

Before: Bandstra, P.J., Zahra and Owens, JJ.

PER CURIAM.

This divorce case is before this Court for the second time. In a prior appeal, this Court reversed a 2001 divorce judgment after determining that the trial court erred by (1) failing to award plaintiff an interest in defendant's business, Scheppelmann Electric, (2) finding that plaintiff was at fault for the breakdown of the marriage based on a relationship that began after the divorce complaint was filed, and (3) basing its spousal support determination on its erroneous determination of fault, resulting in an inequitable spousal support award. *Scheppelmann v Scheppelmann*, unpublished opinion per curiam, issued May 15, 2003 (Docket No. 236732), slip op at 2-4. This Court remanded the case "for the trial court to reconsider its property distribution" and "to reconsider its alimony determination and to articulate its specific findings of fact." *Id.* at 3-4. Plaintiff again appeals as of right from the amended judgment of divorce. We reverse the trial court's spousal support decision but affirm the property distribution.

In 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), quoting *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). On appeal, we must uphold the circuit court's factual findings unless they are clearly erroneous. *McDougal, supra* at 87, quoting *Sands, supra* at 34. A finding is clearly erroneous if, "after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Draggoo v Daggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If the court's findings of fact are not clearly erroneous, we must then determine whether the distribution "was fair and equitable in light of those facts." *Id.* We will affirm a dispositional ruling unless we are left with the firm conviction that it was inequitable. *Id.* at 429-430.

I. Fault

Plaintiff argues that, on remand, the trial court again erroneously determined that she was at fault for the breakdown of the marriage. We agree.

As an initial matter, contrary to what plaintiff argues, this Court did not determine in its prior decision that plaintiff was not at fault. Rather, this Court merely held that the trial court erred in basing its finding of fault on the fact that plaintiff began a relationship with another man after she filed her complaint for divorce. *Scheppelmann, supra* at 3. See *Knowles v Knowles*, 185 Mich App 497, 499; 462 NW2d 777 (1990).

Nonetheless, we hold that the trial court erred when it determined on remand that plaintiff was at fault for the breakdown of the marriage because defendant wished to remain married and she did not. The trial court did not identify, nor does the record disclose, any evidence of extreme actions or conduct by either party that would support a conclusion that one party was at fault for the breakdown of the marriage. On the contrary, both parties testified that they had grown apart, did not have many activities in common, and had lived fairly separate lives in the years preceding plaintiff's decision to file for divorce. The fact that plaintiff filed for divorce, like plaintiff's later relationship with another man, was less a cause than a result of the breakdown of the marriage. See *id.* at 499-501. To find that plaintiff was "at fault" in this circumstance, merely because she was the filing party, is inconsistent with Michigan's no-fault divorce scheme. We therefore conclude that the trial court clearly erred in determining that plaintiff was at fault for the breakdown of the marriage.

Nevertheless, we are not persuaded that this erroneous finding of fault affected the trial court's division of Scheppelmann Electric, defendant's electrical contracting business, which this Court previously ordered was to be divided between the parties. The trial court awarded plaintiff a 40 percent share of this asset. The court justified the nonequal division of this asset by explaining that plaintiff had opportunities to become more involved with the business, but was not interested in doing so. The court did not refer to plaintiff's perceived fault in the breakdown of the marriage when dividing this asset.

II. Valuation and Division of Scheppelmann Electric

The trial court originally found that Scheppelmann Electric was worth between \$220,000 and \$320,000. This Court, in its prior decision in this case, determined that this valuation range was not clearly erroneous, given the experts' varying valuations of the business. *Scheppelmann, supra* at 4; *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). On remand, the trial court valued the business at \$220,000, found that \$20,000 of that amount represented defendant's separate property as the value of the business when he received it from his father in 1976, and divided the remaining portion on a 60/40 basis in favor of defendant. Thus, plaintiff was awarded \$80,000 as her share of this business asset.

Plaintiff now challenges several of the trial court's determinations concerning the valuation and division of Scheppelmann Electric. Plaintiff first argues that the trial court improperly considered new evidence in its valuation of the business. However, nothing

precludes a trial court from accepting additional evidence concerning the value of a marital asset or in valuing it based on a date other than the time of trial or the date of the initial judgment. See *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997). Regardless, although the trial court allowed the parties to present new evidence, it later specifically stated that it was not considering that new evidence in its valuation decision. Thus, there is no merit to this issue.

Plaintiff also argues that the trial court erroneously took judicial notice of the local area's general economic conditions and real estate market in arriving at its valuation decision. However, at the hearing plaintiff's counsel agreed to the taking of judicial notice. Plaintiff cannot now claim that this decision was improper. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000); *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989).

Plaintiff also argues that the trial court clearly erred in awarding \$20,000 of the value of Scheppelmann Electric to defendant as his separate property. Plaintiff maintains that the business was essentially worthless when defendant obtained it from his father. Plaintiff's argument focuses solely on the value of the tangible assets at the time of acquisition and does not take into account the value of goodwill when defendant acquired it. Under the circumstances, we are not left with the definite and firm conviction that the trial court erred by determining that the business had an approximate value of \$20,000 when defendant obtained it from his father. Therefore, awarding that amount to defendant as his separate property was proper. See *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002).

Plaintiff next argues that the trial court erred by refusing to award her half the \$50,000 that represented the Scheppelmann Electric funds that defendant used as a down payment to purchase the Shell Oil property. We disagree. At both the initial trial and the proceedings on remand, the trial court consistently treated the Shell Oil property as part of the total value of Scheppelmann Electric. The trial court's finding is supported by defendant's testimony. Contrary to plaintiff's assertions, this Court did not previously determine that the Shell Oil property was to be treated separately, or that the \$50,000 was not part of the business. This Court merely determined that the trial court originally erred by failing to award plaintiff a portion of the business where she contributed to its appreciation and development during the marriage through her support and contributions as a homemaker. *Scheppelmann, supra* at 3. Plaintiff has not shown that the trial court clearly erred in treating the \$50,000 as part of Scheppelmann Electric for purposes of valuation.

Plaintiff has also not shown that the trial court's overall valuation decision was clearly erroneous. The trial court's final valuation fell within the range established by expert testimony, and within the range that this Court previously determined was not clearly erroneous. This would be true even if we accepted plaintiff's contention that the experts' valuations did not include the \$50,000 amount. Thus, we find no clear error. *Jansen, supra*.

Plaintiff further contends that the division of Scheppelmann Electric was inequitable. When apportioning a marital estate, the goal of the court is to reach an equitable division in light of all the circumstances. *Byington, supra* at 114. Although each spouse need not receive a mathematically equal share, "significant departures from congruence must be explained clearly by the court." *Id.* at 114-115. Relevant factors include "the duration of the marriage, the contribution of each party to the marital estate, each 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.” *Id.* at 115. The weight given to each factor need not be equal and will vary from case to case depending on the circumstances. *Id.*

As previously discussed, the trial court found that although plaintiff made substantial contributions to the marriage, she was unwilling to actively assist defendant in the development and growth of the business. This determination is supported by the parties’ testimony. The trial court did not clearly err in finding that, with respect to this business asset, defendant’s efforts to build and develop the business exceeded plaintiff’s contribution to the marriage as a whole, justifying that defendant receive a greater share of this asset. See *id.* at 114-115. Under the circumstances, the trial court’s decision is not inequitable.

III. Valuation and Division of Marital Home

Next, plaintiff argues that the trial court’s division of the parties’ marital home was grossly inequitable. We disagree.

We first note that, contrary to plaintiff’s assertion on appeal, the trial court did not award defendant \$116,000 of the equity in the parties’ home. At trial, defendant asserted that he and plaintiff used \$25,000 to purchase defendant’s family home from his father. Defendant testified that they bought the home for less than its fair market value, which was between \$40,000 and \$45,000. The trial court treated the \$20,000 discounted price as defendant’s separate property, and the remaining portion as a marital asset. The court valued the home at \$170,000 and awarded the home to defendant, but awarded plaintiff \$66,000 as her share of the home. Thus, defendant’s share of the \$150,000 marital portion was approximately \$84,000.

The record does not support plaintiff’s claim that the court used its erroneous finding of fault to award defendant a greater share of the marital home. After reviewing the trial court’s comments and the property division as a whole, it is apparent that the trial court instead awarded plaintiff other marital property to compensate for the difference in the shares of the marital home that each party was awarded. Under the circumstances, we are not convinced that the trial court’s division of the marital home was inequitable. *Draggoo, supra* at 429-430.

Moreover, we further find that the property division as a whole on remand, although not mathematically equal, was equitable. Plaintiff received approximately 45 percent of the marital assets, with the remaining incongruence due largely to the division of Scheppelmann Electric. We therefore affirm the trial court’s property division decisions.

IV. Attorney Fees

Plaintiff also argues that the trial court erred in its attorney fee award. MCL 552.13(1) indicates that a court may order a party in a divorce action “to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency.” “An award of legal fees in a divorce action is authorized when it is necessary to enable the party to carry on or defend the suit.” *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997). Legal fees “may also be awarded when the party requesting payment has been forced to incur them as a result of the other party’s unreasonable conduct in the course of the litigation.” *Id.* A trial court’s

decision to award attorney fees is reviewed for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 437-438; 664 NW2d 231 (2003).

The record discloses that defendant was ordered to pay \$1,200 of plaintiff's attorney fees pursuant to a prejudgment order, an additional \$4,500 under the original divorce judgment, and another \$4,000 under the amended judgment, for a total payment of \$9,700. Plaintiff argues that defendant should be required to pay a greater amount of her fees because the parties' financial positions are not equal. Yet mere inequality in financial positions is not an adequate basis for a larger award. Although financial inequality between the parties might support a greater award of attorney fees if the trial court also found that plaintiff required financial assistance to pursue the divorce action, see *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005), the trial court did not make such a finding. "The party requesting attorney fees bears the burden of proving they were incurred, and that they are reasonable." *Id.* at 165-166 (citations omitted). Plaintiff asserts that she owes approximately \$40,000 in attorney fees, but she did not present any supporting documentation to this effect. Accordingly, the trial court did not abuse its discretion in its attorney fee award.

V. Interest

Plaintiff next argues that because this Court previously reversed the trial court's initial decision not to award any portion of Scheppelmann Electric to her, she was entitled to interest on the \$80,000 share of this asset that she later received, incurred from the date of the original judgment. We disagree. We review a decision whether to award interest in equity for an abuse of discretion. *Reigle v Reigle*, 189 Mich App 386, 393; 474 NW2d 297 (1991).

"A trial court does not compensate a party for loss in a divorce action, but rather seeks an equitable distribution of property. Accordingly, any interest award in a divorce action is not intended to serve the purpose of compensating a party for lost use of funds." *Id.* at 394. Interest might be appropriate "where the payments due on a property settlement are overdue[,]" because "[a]n award of interest under such circumstances prevents the delinquent party from realizing a windfall and assures prompt compliance with court orders." *Id.* (citations omitted). In this case, however, although this Court previously corrected the trial court's erroneous decision not to award plaintiff a share of defendant's business, defendant did not wrongfully withhold payment from plaintiff. Thus, the trial court did not abuse its discretion in deciding not to award interest to plaintiff.

VI. Spousal Support

Finally, plaintiff argues that the trial court's spousal support award, which the trial court did not change on remand despite this Court's previous determination that the award was inequitable, continued to be inequitable under the circumstances. We agree.

An award of spousal support is in the trial court's discretion. *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).

The main objective of [spousal support] is to balance the incomes and needs of the parties in a way that will not impoverish either party, and [support] is to be based on what is just and reasonable under the circumstances of the case.

Among the factors that should be considered are: (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay [support], (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Id.*]

After reviewing the trial court's rationale for its spousal support award, we conclude that the court abused its discretion. In addition to prejudgment temporary spousal support, the trial court awarded plaintiff support of \$100 a week for the first year and \$60 a week for the second year. However, the trial court also awarded defendant a "credit" of \$9,950 when dividing the marital property, which appears to represent a credit for part of defendant's prejudgment voluntary support payments to plaintiff.

Although both parties have the ability to work, their incomes are disparate. Plaintiff's gross income was about \$10,000 a year working part time. Defendant testified that his net income was approximately \$600 a week, or \$31,200 annually. At the March 3, 2005, hearing, defendant's accounting expert testified that defendant made \$154,000 in taxable income in 2000 and approximately the same in 1999. Defendant's net income in 2000 was \$114,441. Between 2001 and 2004, defendant's net income was \$47,710, \$26,857, \$42,561, and \$36,782, respectively. Therefore, although defendant's net income significantly decreased, his earnings were still appreciably greater than plaintiff's.

We are also troubled by the trial court's focus on plaintiff's alleged lack of contribution to defendant's business as continued justification for the minimal spousal support award. The trial court had already taken this into account in its division of the business. It was inequitable to essentially penalize plaintiff twice for her decision to concentrate on raising the couple's children while allowing defendant to focus on his employment outside the home. Additionally, although the trial court's finding that plaintiff should have been able to find better or full-time employment during the pendency of the divorce proceedings is not clearly erroneous, we cannot agree with the trial court's determination that it should be relatively easily for plaintiff to find a livable wage with benefits, considering plaintiff's age and lack of education or job training. The trial court's determination is also inconsistent with its earlier comments about the deteriorating economic conditions in the Manistee area.

Furthermore, as previously discussed, the trial court again erroneously determined on remand that plaintiff was at fault for the breakdown of the marriage. Unlike the trial court's property division decisions, this erroneous finding of fault was considered as a factor in the trial court's spousal support decision.

For these reasons, we again conclude that the trial court's spousal support award is inequitable under the circumstances and remand for reconsideration of the spousal support award in light of this opinion.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Donald S. Owens