

STATE OF MICHIGAN
COURT OF APPEALS

JUDITH G. GRANADER,
Plaintiff-Appellee,

v

ALAN GRANADER,
Defendant-Appellant.

UNPUBLISHED
October 29, 2009

No. 284282
Oakland Circuit Court
LC No. 06-721399-DO

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant appeals by right a judgment of divorce entered January 14, 2008, primarily arguing the trial court abused its discretion in dividing the marital estate by awarding plaintiff almost all marital assets and assigning defendant almost all marital debts (except those secured by the marital home awarded to plaintiff). Plaintiff argues that the trial court's dispositional ruling awarding plaintiff the majority of the marital assets was indeed fair and equitable in light of defendant's unilateral decisions during the two years preceding the divorce, including continuing to invest in a risky high-tech company called Remote Knowledge, Inc. (RK), and selling the parties' major asset (a real estate development), to fund an irrevocable trust in exchange for a lifetime annuity. Both parties make compelling arguments regarding the trial court's overall division of the marital estate. According appropriate deference to the trial court's findings of fact and dispositional rulings, we affirm but modify the judgment with respect to its disposition of the RK investments in the marital estate. See MCR 7.216(A)(7); *Hagen v Hagen*, 202 Mich App 254, 258; 508 NW2d 196 (1993).

I. Factual Background

We borrow from the trial court's opinion and order entered December 17, 2007, after an eleven-day trial between the dates of March 22 and October 11, 2007.

The parties were married on September 4, 1977. The Plaintiff-Wife (hereinafter "Wife") is 60, while the Defendant-Husband (hereinafter "Husband") is 62. During the course of the parties' 30[-]year marriage, the parties had two children, both of whom are now adults; their son, Elon, is now 27 years old and their daughter, Yael, is presently 23 years old.

Husband was a real estate developer involved in various business endeavors with his family. Since the birth of the parties' oldest child, Wife was a stay-at-home mom. Wife was also active in the community, which during the marriage was an asset to the Granader family's public persona. Husband acted as the general partner in various family investments, as well as managed various real estate investments held in his sole name.

The trial court found "telling," which we assume to mean truthfully revealing, defendant's "assertions (admissions) [in a pleading] that: . . .

- "He has 'never done any act to jeopardize the party's finances, but in fact, Plaintiff owes the financial security and comfortable lifestyle to Defendant's management and investment skills'; and,
- "Plaintiff has had no interest in the parties['] finances, paying of bills, or investment for the last 29 years."

While not explicitly finding that plaintiff was incapable of supporting herself, the trial court found that her need for support was far greater than defendant's, who could still work.

The family led a very comfortable lifestyle. The finances required to facilitate the same were seldom, if ever, discussed. Although Wife has both a Masters of Arts and Bachelors of Arts from U of M, she has been out of the workforce for approximately 27 years.

From the limited testimony presented regarding Husband's health, it appears that he is an able-bodied individual, who is in good health, who although "semi-retired" would still be capable of employment. His decision to "semi-retire" was a unilateral decision made by Husband, following or otherwise contemporaneous with his liquidation of the parties' marital estate.

The trial court reviewed plaintiff's health history, which includes a 1990 prophylactic hysterectomy and oophorectomy, surviving a 1995 bout with advanced stage ovarian cancer, and a prophylactic mastectomy in 2005. Plaintiff continues to take Tomaxifin, must have cat scans and ultra sounds every three months, and has diabetes. In reserving the issue of plaintiff's right to spousal support from defendant, the court cited plaintiff's "ongoing need for support (not only as a result [of defendant's rendering the marital estate illiquid], but also due to the poor state of her health)." The trial court also found that plaintiff "needs \$25,000 per month to support herself."¹

Without making a finding on fault, the trial court reviewed the parties' testimony:

¹ Although defendant argues on appeal that plaintiff's health does not preclude her from employment and that the court's dispositional ruling permits plaintiff to continue reckless spending, he does not point to evidence to show that this finding was clearly erroneous.

Wife contends that the marriage broke down as a result of her illness. She felt that at times Husband was not supportive of her, while at other times he was repulsed by her appearance. She also contends that Husband's recent sexual predilections contributed to the breakdown in their marital relationship. Husband contends the marriage was poor from the start and completely broke down 12 years ago (which would have been in 1995 when Wife first was diagnosed), based upon what he contends was the immense pressure that Wife's rampant spending placed upon the family's finances as well as her demeanor and attitude toward him. He testified that although he believed the marriage was essentially over 12 years ago, he stayed with Wife until the children were grown and out of the house and attempted to stick it out through the worst of her health problems. He also contends that he went along with her spending . . . because he was simply trying to appease her. Whatever the rationale, the evidence indicated that the parties' monthly living expenses (which included significant financial support for their adult children) were significant and extravagant. In 2004 the average monthly charges made against the American Express Platinum Card account were just under \$15,000 per month. In 2005 this average was in excess of \$18,000 per month. The above referenced charges didn't include health insurance or many other costs associated with maintenance of the home, or the \$800 per week allowance provided by Husband to Wife for incidentals. Husband testified that his personal monthly expenses currently average \$7,000.

The trial court observed that it was "troubled" by defendant's "unilateral decision to liquidate the parties' entire marital estate, and place essentially all of the assets into an Irrevocable Inter-Vivos Dynasty Trust." The court noted that it was not the decision to sell the parties' real estate holdings that troubled it, but rather defendant's "decision to convert over \$4 million dollars in marital assets into a stream of income that provides the parties with a gross [monthly] income of \$21,531," with after taxes, a "net income of approximately \$16,794 per month being available to the parties to meet all of their financial needs."

The trial court also drew unspecified negative inferences against defendant from his decision to establish the trust and fund it with the proceeds from the sale of the parties' major asset, a real estate development known as Professional Village Management, LLC, (PV). The court opined that in light of plaintiff's "known medical condition and the parties' prior budgetary constraints, this does not appear to be grounded in an effort to provide financial security for the parties, but rather appears to be premised upon some other motivation or intended for some other purpose." Yet the trial court itself noted the trust was intended to benefit the parties' children by limiting inheritance and capital gains taxes. Further, defendant provided health insurance for plaintiff's medical needs, and it is undisputed that the parties simply did not live within budget constraints. Defendant supported the parties' extravagant lifestyle in part by borrowing and invading the capital accounts of his businesses. This practice continued through the trial, and was also the reason that capital gains on the sale of PV could not be completely deferred.²

² The sale of PV netted \$3,466,078, but also generated \$3,392,126 in ordinary income
(continued...)

Defendant established the trust on February 22, 2005 and initially funded it with 1,331,524 RK warrants.³ On April 29, 2005, defendant exchanged his interest in PV to the trust in exchange for the lifetime annuity. The sale of PV closed on August 18, 2005. In making its determination regarding the size of the marital estate contemporaneous with the establishment of the trust and its funding, the trial court relied heavily on a personal financial statement that defendant signed on September 23, 2005, listing his assets and liabilities as of April 15, 2005.⁴ The financial statement indicates defendant's net worth was \$6,435,000, and lists major assets as PV (\$3,900,000), West Shore Estates (\$1,100,000)⁵, and stocks, mostly common and preferred in RK (\$2,180,000). The largest liability defendant listed in the 2005 financial statement was a personal note to his father, Harry Granader, for \$1,650,000.

The parties do not dispute that defendant's entire real estate career was financed in large part by loans from and partnerships with his father, who passed away during these proceedings on August 6, 2006. Plaintiff filed this action for divorce on May 30, 2006. One month before, on April 21, 2006, defendant entered an agreement with his father to repay money he borrowed from his father between 1985 and 1995 with a principal balance of \$1,669,581.50 and accrued interest of \$2,280,000. Defendant paid the debt by assigning his interest in RK securities described as (a) 1,800,000 common shares dated 10/04/05, (b) 2,700,000 warrants dated 01/06/06, (c) 675,000 warrants dated 04/20/06, (d) a \$675,000 equity interest in a 5% Secured Convertible Promissory Note dated 01/06/06, and (e) an assignment of defendant's subscription rights to purchase an additional 900 Series B preferred shares. The same day that defendant and his father signed the agreement to transfer securities and satisfy the debt, Harry Granader also signed a handwritten codicil to his will bequeathing the same listed RK securities to defendant. Both the agreement and the will codicil listed, but omitted by initialed lineout, three other items:

475 Series B Preferred shares plus warrants attached thereto, which had been paid for but not yet issued as of the date of the agreement;

A right to receive 60% of the stock options pledged by Randy S. Bayne pursuant to a stock pledge agreement dated 8/11/05; and,

(...continued)

(depreciation recapture), and \$4,785,596 in long-term capital gains. Placing the sale proceeds in the trust reduced the long-term capital gains income to \$1,126,304. The sale generated a combined federal and state tax liability of about \$1.1 million, which, with penalties and interest, grew to about \$1.5 million at the time of trial.

³ A warrant is a "derivative security that gives the holder the right to purchase securities (usually equity) from the issuer at a specific price within a certain time frame." <<http://www.investopedia.com/terms/w/warrant.asp>> (accessed 9/25/2009). "The main difference between warrants and call options is that warrants are issued and guaranteed by the company, whereas options are exchange instruments and are not issued by the company." *Id.* "Also, the lifetime of a warrant is often measured in years, while the lifetime of a typical option is measured in months."

⁴ Although the trial court stated that defendant made this financial statement "under oath," the copy furnished to this Court bears no jurat or notary's signature.

⁵ West Shore Estates consisted of 19 lots, 9 of which were sold before trial. The remaining 10 lots were transferred, after trial, to the mortgagee by deed in lieu of foreclosure.

A right to receive 60% of the common shares pledged by Harry S. Bayne and Bace International pursuant to a stock pledge agreement dated 11/8/05.

Defendant claims the property interests that were deleted from the agreement either never came into existence or were converted to common shares. Nevertheless, the trial court awarded them to defendant “to the extent such interests still exist.” With respect to the RK securities that defendant inherited through the will codicil, the trial court ruled they were not part of the marital estate. Nevertheless, the trial court awarded to defendant as part of its division of marital assets: “The common stock, warrants and convertible note which he inherited from is father.”

The trial court detailed defendant’s investment in RK,⁶ which began in 2003. Reviewing information contained in filings with the Securities and Exchange Commission (SEC), the court labeled the investments by defendant (as well as his brothers and father) in RK as a “risky endeavor.” The court noted that by 2004, defendant and his family had become “angel” investors for RK and that 2005 SEC filings stated defendant and his family had waived sales contingencies contained in prior commitments to continue their subscription agreements to purchase additional securities. This, the court concluded, “began what became a course of conduct to put good money after bad, as the ‘family’ attempted to save its prior investments in RK.” After further review of defendant’s investments in RK, the trial court critically found:

Although it is not possible to determine the total amount of Husband’s holdings and interest in RK, from the SEC filings, it is clear from said filings, and the testimony presented in Court, that Husband, without consultation with or the approval of Wife, engaged in a concerted investment tact [sic] that resulted in all of the parties’ assets essentially being invested into a single and highly risky investment, which now threatens to either devastate the parties’ financial future or make them extremely wealthy. If there was any risk assessment made, it was done solely by Husband, without consultation with or consideration of the potential consequences to Wife.

After detailing various financial transactions during the divorce proceedings, including the sale of two other real estate developments, the trial court opined:

Because the Court can not now undo the harm occasioned to this marital estate by Husband’s unilateral financial decisions (and desire to preserve his

⁶ “Remote Knowledge, Inc., a development stage company, engages in the development, delivery, and support of proprietary in-motion communications, and data transfer and management services to the maritime industry. Its products include GEO Mobile that deliver high-speed Internet access and voice services, two-way data transfer, email, and text messaging services, as well as remote vessel monitoring and control of shipboard systems to a vessel while in motion anywhere in the world. The company, formerly known as Varitek Industries, Inc., was founded in 1939 and is based in Houston, Texas.”

<<http://investing.businessweek.com/research/stocks/snapshot/snapshot.asp?ric=RKNW.PK>> (accessed 9/22/2009).

family's investments in RK), this Court will not be addressing whether the conveyance to the Trust represented a fraudulent transfer and/or whether Wife has a viable cause of action against the Trust. Rather, this Court will attempt to fashion an equitable resolution with regard to the parties' remaining assets and sources of (potential) income upon dissolution of their marital union.

The trial court first reviewed the marital assets existing at the time of trial, assigning values to most. With respect to the marital home, the court found that defendant's expert was not credible, but the court also did not accept the testimony of plaintiff's expert. Rather, the court valued the home as defendant had in his 2005 financial statement at \$865,000; this value was below the opinion of defendant's expert and above that of plaintiff's expert. Subtracting the secured debt from this value, the court determined the equity in the marital home was \$212,519. The trial court awarded the marital home with its secured debt to plaintiff. The court also awarded plaintiff the furniture, fixtures and appliances in the marital home, finding defendant's 2005 financial statement valuation of \$40,000 the most credible evidence of its value.

The trial court awarded the entire private annuity from the trust to plaintiff. In its opinion, the court concluded the present value of the annuity was \$847,985. On appeal, the parties agree the court's valuation stated only one-half of the actual present value of the annuity of \$1,695,970. The judgment of divorce awarded plaintiff 100% of monthly annuity income of approximately \$21,000 and reserved the trial court's right to review spousal support for plaintiff in the event the trust failed to meet its monthly income obligation.

Regarding the RK securities in the marital estate, the court adopted the opinion of defendant's expert that a 25% discount be applied to their value because the securities were restricted to private sales. In doing so, the court awarded to plaintiff 76,680 shares of common stock⁷ valued at \$31,506 and 1405 shares of series B preferred stock valued at \$772,749. The court also awarded plaintiff the entirety of 4,420,000 RK warrants dated September 30, 2005. The court further purported to award each party 962,500 of 1,900,000 RK warrants dated August 31, 2004.⁸ In addition, the trial court awarded plaintiff one-half interest in any notes before April 15, 2005, by which RK owed defendant money, together with rights attendant to the notes; the court awarded defendant 100% any such notes with their attendant rights after April 15, 2005.⁹ As noted already, the trial court awarded defendant, "to the extent such interest exist," the items identified but excised from defendant's agreement with his father to satisfy debt and his father's will codicil. Finally, as part of its division of marital property, the court "awarded" defendant

⁷ Fifty thousand (50,000) of these shares came from defendant's investment account at UBS Financial Services, Inc. The trial court awarded each party one-half of securities, if any, that remained in the UBS account.

⁸ On appeal, the parties agree the trial court intended to award each party 50% or 950,000 of these warrants; plaintiff agrees the judgment should be modified to reflect the court's intent.

⁹ The trial court referred to these as "loan payables." Defendant claims the loans he made to RK were converted to common stock and warrants before April 14, 2005.

the RK securities that defendant inherited from his father pursuant to the will codicil and which the court determined were defendant's separate property.

The parties agree the remaining major asset in the marital estate at the time of trial was a real estate development, West Shore Estates. The trial court valued this asset at \$1,100,000, which was the same value defendant assigned to it in his 2005 financial statement, and awarded each party a one-half interest in it. The parties agree this asset is no longer at issue.¹⁰

The trial court also awarded plaintiff various minor assets with values determined by the trial court in parenthesis: two State of Israel bonds (\$1,000); two Fidelity brokerage accounts (\$3,272); a LaSalle Bank Midwest account (\$25,000)¹¹ and a Franklin Bank account in plaintiff's name (\$250). The court awarded defendant his personal property and the National Bank checking accounts in his name.

With respect to liabilities, the trial court assigned all debts secured by the marital home to plaintiff (\$652,481). The court assigned all taxes, penalties and interest the parties accrued through the date of the court's opinion (\$1,575,481), to defendant. The trial court also assigned all of the parties' credit card debt to defendant (\$180,313).

In making its division of marital property, the trial court stated it considered that had the marital assets been sold in 2005, taxes paid, and the net proceeds distributed to each party without the creation of the annuity, plaintiff "should have received a distribution of \$2,032,099, representing ½ of the net marital estate as of April 15, 2005 (per the financial statement prepared in September, 2005)." The court also opined that the date of valuation for marital assets was within its discretion and that the court could ignore the decline in value of an asset "due to one party's unilateral bad investment decisions or actions," citing *Everett v Everett*, 195 Mich App 50, 56; 489 NW2d 111 (1992), and *Dougherty v Dougherty*, 48 Mich App 154, 161, 210 NW2d 151 (1973). The court concluded that the date of valuation could vary from asset to asset as the facts and circumstances warranted to achieve a fair and equitable distribution of marital property. Despite these oblique comments, the following statements in the trial court's opinion appear critical to the court's reasoning in awarding the greater share of marital assets to plaintiff and the greater share of marital liabilities to defendant.

The Court has considered the financial investment decisions made by Husband, to Wife's detriment, and his actions since Wife's illness in the division of the assets by this Court and Wife's present financial needs in the division of the marital estate.

The court went on to explain that it found from the evidence at trial that plaintiff needed \$25,000 per month for her support. Further, awarding plaintiff the annuity would not

¹⁰ See n 5, *supra*.

¹¹ The trial court noted that "[t]his account held \$50,000 as of 5/18/06, from which Wife indicated that she paid her first attorney a retainer of \$25,000."

satisfy this need, and the other major assets of the marital estate were illiquid, including the marital home and the restricted PK securities. Thus, the trial court found that under the circumstances presented, awarding plaintiff a greater share of the marital estate was warranted to assist plaintiff to meet her financial needs.

Finally, the trial court awarded plaintiff an “additional”¹² \$25,000 as a contribution toward her attorney fees and costs, reasoning as follows:

The bulk of the parties’ attorney fees, to date, have been paid and funded via the disposition of marital assets and/or borrowings from relatives. Given Wife’s extremely limited liquidity, and the fact that Husband has significant separate property which is being retained by him, the Court awards Wife \$25,000 in additional attorney fees and costs, over and above those already contemplated by the Court in the division of the marital estate above. Given the limited liquidity of each of the parties, when the division of the assets contemplated hereunder as well as the contribution already computed in the marital division, of \$25,000, and the additional \$25,000 specified in this provision of the Opinion and Order, the Court leaves each of the parties responsible for his/her own additional outstanding attorney fees and/or costs

The court entered the judgment of divorce January 14, 2008, consistent with its December 17, 2007, opinion and order. The trial court granted in part defendant’s post-judgment motion to amend the judgment, to correct misstatements in its opinion regarding the equity in the marital home and value of a portion of the RK common stock. Defendant now appeals by right the judgment of divorce. Defendant argues that the trial court’s method of valuing the marital assets and its division of the marital estate violates due process of law, that the trial court’s overall division of marital assets is unfair and inequitable, that the court’s valuation and division of certain assets was fundamentally unfair, and that the trial court abused its discretion in awarding plaintiff attorney fees. Finally, defendant argues that because of the trial court’s apparent bias against him, this matter must be remanded to a different judge for a more equitable division of the marital estate.

II. Standard of Review

A claim that a party has been denied due process is a question of law this Court reviews de novo on appeal. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005). This Court reviews a trial court’s decision regarding attorney fees for an abuse of discretion. *Id.* at 164.

This Court recently stated the pertinent legal principles and standard for appellate review of claims that the division of marital property in a divorce case was unfair or inequitable. In *Berger v Berger*, 277 Mich App 700, 716-718; 747 NW2d 336 (2008), this Court opined:

¹² See n 11, *supra*.

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.

On appeal, this Court must first review the trial court's findings of fact for clear error. 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 was made. The trial court's factual findings are accorded substantial deference. If the trial court's findings of fact are upheld, this Court must decide whether the trial court's dispositional ruling was fair and equitable in light of those facts. This Court will affirm the lower court's discretionary ruling unless it is left with the firm conviction that the division was inequitable. [Citations and quotation marks omitted.]

III. Analysis

Defendant claims the property division here was so inequitable as to constitute a violation of due process. He includes this claim in the midst of his first series of arguments regarding the trial court's valuation of marital property and other findings of fact. Usually, an appellate court "will not reach constitutional issues that are not necessary to resolve a case." *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234 n 23; 507 NW2d 422 (1993). Moreover, defendant devotes a mere few lines and a footnote in his fifty-page appellate brief to his discussion of how the trial's error could amount to a violation of due process. A party may not give only cursory treatment to an issue and then expect this Court to discover and rationalize the basis for its claim. *Greater Bethesda Healing Springs Ministry v Evangel Bldrs & Constr Mgrs, LLC*, 282 Mich App 410, 413; 766 NW2d 874 (2009). "Insufficiently briefed issues are deemed abandoned on appeal." *Id.* Furthermore, even if we were to address the merits of this claim, it appears to be no more than that the trial court's rulings were arbitrary and based on bias. Judicial rulings, however, are almost always insufficient by themselves to overcome the strong presumption of judicial impartiality. *Gates v Gates*, 256 Mich App 420, 440-441; 664 NW2d 231 (2003). The record reflects that defendant "had a fair hearing on the merits at which [he] was present, represented by counsel, and actively participated. Thus, [he] was accorded due process." *Dart v Dart*, 460 Mich 573, 579-580; 597 NW2d 82 (1999).

Defendant's primary claim on appeal is that the trial court's division of marital property is so congruent that it is unfair and inequitable. Defendant's claim, at first blush, appears to have some merit. Here, the trial court awarded plaintiff almost all of the marital assets and assigned defendant almost all marital debts (except those secured by the marital home awarded to plaintiff). Plaintiff, however, cites caselaw that indicates under certain circumstances such a

lopsided division of the marital estate may be upheld as fair and equitable. In particular, she argues that the trial court fairly divided the marital property by properly holding defendant responsible for his own unilateral conduct, citing *Dougherty, supra*, which in turn cites *Metcalf v Metcalf*, 28 Mich App 442; 184 NW2d 560 (1970), and *Marrobie v Marrobie*, 334 Mich 447; 54 NW2d 623 (1952).

In *Dougherty*, a divorce case involving “a most industrious couple until the decline of their marriage,” the parties’ major assets included a 20-acre parcel held by the entirety and equipment and stock for a nursery business held solely in defendant’s name and which was heavily indebted. The nursery business was one of several profitable enterprises the couple had engaged in over the years but which became unprofitable and heavily indebted shortly before the divorce. This Court affirmed the trial court’s decision to segregate the entirety property, divide the net proceeds from its sale between the parties, and assign the business property and its debt to the defendant. *Dougherty, supra* at 156-157, 161. This Court noted that “[the] plaintiff, encouraged by [the] defendant, discontinued her participation [in the business] and that a majority of the debts were incurred subsequently by defendant individually. The inclusion of this indebted business into the property division would have effectively depleted plaintiff’s equity in the remaining assets.” *Id.* at 161. Thus, this Court concluded the trial court’s division of marital property, which placed “the onus of the business’s deteriorating financial condition upon [the] defendant is neither inequitable nor unjust.” *Id.* at 161.

In *Marrobie*, the parties separated after an 18-year marriage during which the plaintiff had been the parties’ primary source of income. The plaintiff “testified that from her earnings she maintained the home, bought groceries and took care of the bills, and what was left of her earnings, she put in the ‘kitty,’ i.e., a safe for their joint savings.” *Marrobie, supra* at 448. The trial court credited the plaintiff’s testimony, finding that the defendant “had taken the \$8,400 ‘in the kitty’ . . . at about the time of the inception of the divorce proceedings.” *Id.* at 451. The *Marrobie* Court also noted that the defendant “had gambled away and hypothecated much of the earnings of the parties.” *Id.* at 453. The divorce “decree” awarded the plaintiff the marital home, valued between \$5,200 and \$6,000, and a “United States savings bonds of the face value of \$1,975.” *Id.* at 452. The defendant appealed “because the decree awarded practically all the property to [the] plaintiff wife.” *Id.* at 452. Our Supreme Court assumed that the trial court had intended to assign to the plaintiff the household furnishings (valued between \$500 and \$1,000) but had not, so “the decree shall be modified to assign the same to the wife.” *Id.* The Court also noted that a \$400 “vacant lot in Dearborn is not disposed of by the decree and the decree may be amended to assign whatever interest the parties have in the same to the husband.” *Id.* The *Marrobie* Court affirmed the judgment of divorce as so modified. *Id.* at 453.

Defendant argues that this case is distinguished from those above because he did not gamble away or otherwise dissipate the marital estate through illegal conduct. Rather, he maintains that he merely continued to make business decisions, to which plaintiff had acquiesced, as he always had throughout the marriage. Indeed, plaintiff concedes in her brief on appeal that defendant viewed his investments in RK as a “‘once in a lifetime opportunity’ that simply could not fail,” i.e., that ultimately would make the parties, in the words of the trial court, “extremely wealthy.” Further, as noted *supra*, the record does not appear to support the trial court’s ascribing to defendant an unnamed nefarious motive for establishing the trust and the annuity. Despite this, the trial court made findings of fact regarding the traditional factors courts

must consider when attempting to achieve a fair and equitable division of a marital estate, see *Berger, supra*, which if not clearly erroneous, would support the trial court's dispositional ruling to award a greater share of the marital estate to plaintiff.

Specifically, the trial court found that (1) the marriage was lengthy, (2) that each party had contributed to the growth the marital estate, (3) that the parties were in their sixties, (4) that the health of plaintiff was precarious but defendant's health was relatively good, (5) that plaintiff had been out of the work force and a "stay-at-home mom" for many years while defendant had been engaged in real estate development and property management all his life, earning for the family a very comfortable lifestyle, (6) that plaintiff needed \$25,000 for her support while defendant's expenses were \$7,000 a month; and (7) that because of her age, health, and being out of the workforce for essentially the length of the marriage, plaintiff would not be capable of supporting herself. Defendant, on the other hand, despite the death of his benefactor father, was fully capable of continuing his career of real estate development and property management. Finally, with respect to the parties' conduct and general principles of equity, the trial court found that defendant liquidated relatively safe real estate investments in the marital estate to pursue "a single and highly risky investment." Further, defendant established a trust, also heavily invested in the same high-risk investment, in exchange for a lifetime annuity.

We now review defendant's specific claims of error. First, defendant asserts that the trial court used different dates to value different marital assets to skew its award of property in favor of plaintiff and against defendant, pointing specifically to the trial court's use of defendant's 2005 personal financial statement. We disagree. While the trial court utilized the 2005 financial statement to speculate on the size of the marital estate had certain actions occurred at that time, it does not appear that this exercise formed the basis of assigning value to the marital assets existing at the time of trial. Rather, we read the trial court's opinion as using this exercise to demonstrate the drastic change in the status of the marital assets from 2005 to the time of trial in 2007. Further, the trial court used the values stated in the financial statement for the marital home and its furnishings to arrive at values to assign to them but only did so in evaluating other evidence at trial regarding these assets. Additionally, defendant on appeal has waived any claim of error regarding these assets. The only other asset the trial court used the 2005 financial statement to value was West Shore Estates. But the trial court ultimately awarded each party one-half interest in that asset in the judgment of divorce, without assigning to it any value. Defendant also concedes, "West Shore Estates may now be a wash, without meaning to either party." Although attempting to divide a marital estate on the basis of its value at some point in the past with the help of hindsight driven speculation is fraught with difficulties, we conclude that in this case the trial court only attempted to fashion an equitable division of the marital assets as they existed at the time of trial.

Defendant next argues that the trial court overstated plaintiff's health problems and understated her ability to earn an income. Further, defendant contends the trial court understated his health problems and overstated his ability to earn. Defendant argues he is virtually unemployable because of his age and because he can no longer rely on his father's financial backing to pursue his real estate development and property management career. "The trial court's factual findings are accorded substantial deference." *Berger, supra* at 717, citing MCR 2.613(C), and *Sparks v Sparks*, 440 Mich 141, 147; 485 NW2d 893 (1992). "Deference is given to the special opportunity of the trial court to judge the credibility of witnesses." *Thames v*

Thames, 191 Mich App 299, 302; 477 NW2d 496 (1991). “A finding is clearly erroneous if the reviewing court, on all the evidence, is left with a definite and firm conviction that a mistake has been committed.” *Id.* at 301-302. Given the trial court’s superior fact-finding ability, defendant’s arguments are simply insufficient to create in this Court a definite and firm conviction that the trial court made a mistake regarding these factors.

Next, defendant argues that the trial court overemphasized the parties’ fault or conduct in dividing the marital estate. We disagree. A trial court may consider a party’s fault in causing the breakdown of the marital relationship as a factor when dividing the marital estate, but “the trial court must consider all the relevant factors and not assign disproportionate weight to any one circumstance.” *Sparks, supra* at 158. Here, although the trial court summarized the parties’ testimony regarding their respective beliefs as to the cause of the breakdown of the marital relationship, it does not appear that the trial court accepted either party’s belief as a specific finding. With respect to the conduct of the parties, the trial court clearly gave considerable weight in dividing the marital estate to defendant’s conduct in transforming marital property from being heavily invested in real estate to investments in a high-risk, high-tech company and a fixed annuity from a trust, also heavily invested in the same risky company. However, when dividing a marital estate, the trial court need not follow a precise mathematical formula, nor must it give equal weight to each factor it considers relevant in dividing the marital estate. *Berger, supra* at 721. Further, we do not read the trial court’s opinion and its division of marital assets as an effort to “punish” defendant, but rather an attempt to provide support for plaintiff given the type of assets existing in the marital estate and the parties’ respective needs and earning capabilities.

Defendant next raises several inconsequential errors, asserting they rendered inequitable the trial court’s dispositional rulings dividing the marital estate. We disagree. With respect to the RK warrants dated August 31, 2004, the parties agree that the trial court intended to award each party one-half of these warrants or 950,000; consequently, we remand for the trial court to modify the judgment of divorce to reflect the court’s intent. Regarding the items that were omitted from the agreement between defendant and his father to satisfy debt, the trial court placed no value on these items and assigned them to defendant “to the extent such interests still exist.” Although defendant claims these items did not exist at the time of trial, the court’s ruling does not affect the trial court’s overall division of the marital estate supported by its findings of fact, which defendant has not shown to be clearly erroneous. Similarly, the trial court’s award to each party of one-half “the balance of securities remaining, if any, as of August 11, 2007 in Defendant’s UBS account,” does not affect the trial court’s dispositional ruling. The parties agree that at the time specified the UBS account did not contain 50,000 common shares of RK, which were awarded to plaintiff elsewhere in the judgment of divorce. Finally, the trial court’s misstatement regarding the present value of the annuity is immaterial because the trial court clearly intended to award the entire annuity to plaintiff because of the parties’ respective needs and earning capacities and because defendant was solely responsible for the manner in which the marital assets were invested.

Defendant also argues that specific assets and the parties’ liabilities were inequitably divided. Regarding the court’s award of the entire annuity to plaintiff, defendant has not shown that the trial court’s findings of fact supporting that disposition were clearly erroneous.

Consequently, we are not left with a firm conviction that the trial court's discretionary ruling regarding this asset was unfair or inequitable.

We also are not left with a firm conviction that the trial court's discretionary ruling assigning the marital debts and tax liabilities to defendant was unfair or inequitable. Defendant was responsible for marital finances throughout the marriage. To the extent defendant complains that much of the parties' debt resulted from plaintiff's irresponsible spending, it was defendant who acquiesced to and financially supported that lifestyle. In other words, holding defendant responsible for the parties' finances up to the point of the end of the marriage is consistent with how the parties lived their marriage. Moreover, it was defendant's decisions regarding the parties' finances and the disposition of marital assets that resulted in the huge tax liability.

Defendant also argues that an indemnity clause in the judgment of divorce is inequitable because it may be applied to a lawsuit an architect filed after trial for work done on the marital home during the marriage. We decline to address this issue because it was not raised in the trial court. "Issues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers, Inc*, supra at 234.

Next, defendant argues that the trial court's award to plaintiff of all funds remaining in a LaSalle bank account, see note 11, *supra*, was contrary to an agreement of the parties. The record does not support defendant's claim. He points to his own handwritten letter to his attorney dated July 8, 2006, and also asserts the agreement was adopted by the trial court in an order dated August 29, 2007, continuing status quo. The court's order, however, refers to the parties' signed agreement of June 29, 2006, and the order only provides that the agreement will continue, "until the court renders it's [sic] opinion on the case" The June 29, 2006, signed agreement provides that the funds at issue "will remain intact and will be accounted for at the appropriate time." Consequently, defendant's argument regarding this asset fails.

Finally, defendant argues that the trial court's "lopsided division of the RK securities was entirely inequitable." We conclude defendant's argument has merit: It appears the trial court justified its disparate award of marital estate RK securities because defendant inherited substantial RK securities from his father, but which the court determined were not part of the marital estate. Generally, marital assets are subject to division between the parties but the parties' separate assets may not be invaded. *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002); *Dart*, supra 584-585. The trial court did not specifically find facts necessary to apply an exception to this rule to invade the separate property of one spouse to support the other. See MCL 552.23(1); *Reed*, supra at 152. Further, the trial court's findings regarding the disparate needs and earning capacities of the parties, which justify awarding the annuity to plaintiff, do not apply to the non-income producing RK securities that are not readily marketable. The trial court viewed the RK investments as high-risk and throwing "good money after bad" and which would "either devastate the parties' financial future or make them extremely wealthy." We conclude that the trial court's findings do not overcome the presumption that a fair and equitable division of the RK securities in the marital estate would be one that achieves congruence. *Berger*, supra at 717; *Byington v Byington*, 224 Mich App 103, 114-115; 568 NW2d 141 (1997). We therefore remand to the trial court to modify the judgment of divorce to award each party one-half of all RK securities in the marital estate.

Defendant also argues that the trial court abused its discretion by partially awarding plaintiff attorney fees. MCL 552.13 and MCR 3.206(C) authorize trial courts to award attorney fees in domestic relations cases. *Reed, supra* at 164. Generally, “[a]ttorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit.” *Gates, supra* at 438. Further, “a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support.” *Id.*

Defendant argues that the trial court failed to make adequate findings to justify its award to plaintiff for attorney fees. Plaintiff argues that the record amply demonstrates her financial need, that defendant has substantial separate assets, and that plaintiff’s testimony established her actual attorney fees were far in excess of the \$25,000 awarded by the trial court. We agree that the record supports an award of attorney fees to plaintiff. Defendant has not established that the trial court’s award was outside the range of principled outcomes. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007).

In conclusion, we remand to the trial court to modify the judgment of divorce with respect to the number of RK warrants dated August 31, 2004, and provide that each party be awarded one-half of all RK securities as determined at trial to be part of the marital estate. Except for these modifications we affirm the judgment of divorce. *Marrobie, supra* at 453. Because of this resolution, we need not address defendant’s request that this case must be assigned to a different judge. Defendant may, of course, move within the court rules for disqualification of the judge if any further proceedings occur in the trial court.

We affirm the judgment of divorce but remand this matter to the trial court for modification of the judgment as set forth in this opinion. Neither party having prevailed in full, no taxable costs are awarded. MCR 7.219. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello