

STATE OF MICHIGAN
COURT OF APPEALS

LINDA ANN GOCHA,

Plaintiff-Appellee,

v

LARRY LANE GOCHA,

Defendant-Appellant.

UNPUBLISHED

October 28, 2010

No. 292442

Genesee Circuit Court

Family Division

LC No. 07-278858-DO

Before: BORRELLO, P.J., and CAVANAGH and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce. For the reasons set forth in this opinion, we affirm.

The parties in this action were married for nearly forty years. During the marriage they had three children all of whom were adults at the time plaintiff filed for divorce. At the time of the divorce plaintiff was employed as a nurse and defendant was employed as a mechanic/technician. At the time of the divorce, both parties were earning about the same amount per year. Following a bench trial, the court issued a judgment of divorce dissolving the marriage and, as will be more fully discussed *infra*, awarding assets and allocating debt to the parties. Defendant appealed and for the reasons set forth below, we affirm the findings and holdings of the trial court.

Defendant's first issue presented on appeal is that the trial court erred by refusing to determine whether the proceeds from a tort lawsuit settlement were marital property or separate property, and by not including the proceeds from the lawsuit in the marital estate.

On appeal from a property division in a divorce action, an appellate court must first review the trial court's findings of fact for clear error. *Berger v Berger*, 277 Mich App 700, 717; 747 NW2d 336 (2008). A finding is clearly erroneous if, after a review of the entire record, the court is left with the definite and firm conviction that a mistake was made. *Berger*, 277 Mich App at 717. If the trial court's findings of fact are upheld, the appellate court must then decide whether the trial court's dispositional ruling was fair and equitable in light of those facts, and it will affirm the trial court's discretionary ruling unless left with the firm conviction that the division was inequitable. *Berger*, 277 Mich App at 717-718.

Absent a binding agreement, the goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *Berger*, 277 Mich App at 716-717. To reach an equitable division, the trial court should consider 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. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996).

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). Marital assets are those assets a spouse earns during the course of a marriage. MCL 552.19; *Reed v Reed*, 265 Mich App 131, 152; 693 NW2d 825 (2005). However, a spouse's separate estate can be opened for redistribution when one of two statutorily created exceptions is met. Separate property may be invaded if, upon entry of a divorce judgment, the property awarded to one party is not sufficient for the suitable support of one party or the party's children. MCL 552.23. In the alternative, separate property may be invaded if one "party contributed to the acquisition, improvement or accumulation of the property." MCL 552.401.

"Proceeds from a personal injury lawsuit meant to compensate for pain and suffering are not joint marital property." *Pickering v Pickering*, 268 Mich App 1, 10; 706 NW2d 835 (2005). Nevertheless, those proceeds can be distributed as part of the property division under MCL 552.23 or MCL 552.401. *Id.* Also, a personal injury settlement can be treated as marital property where the original action included a loss of consortium claim and the settlement check was made payable to both parties and was treated by the parties as marital property. *Id.* at 11.

In this case, the evidence in the record indicates that the settlement proceeds were intended to compensate plaintiff for pain and suffering, and, therefore, were properly treated as separate property. Plaintiff suffered horrible injuries as a result of a failed tummy tuck and hernia repair procedure. She was on a ventilator for four days and in the ICU for six days. She spent more than three weeks in the hospital in total and was out of work for 14 weeks. She suffered permanent scarring to her abdomen and thighs. There is no evidence in the record that defendant made a loss of consortium claim in plaintiff's original action. While both defendant and plaintiff signed the release to obtain the settlement, there is no evidence in the record that the check was made out to both plaintiff and defendant. Thus the only evidence in the trial record indicates that plaintiff was compensated for her pain and suffering as a result of medical malpractice. Therefore, the trial court did not clearly err in finding that settlement proceeds amounted to separate property.

Moreover, the trial court did not err in refusing to invade plaintiff's separate property under either MCL 552.23 or MCL 552.401. The settlement proceeds were not required to insure the support of defendant. Defendant did not request alimony and he recognized that he did not need financial support from plaintiff. Moreover, defendant did not contribute greatly to relieving plaintiff's pain or suffering. According to his own testimony, defendant was not even aware that plaintiff was having surgery until the day before surgery. Defendant did help plaintiff recover from her surgery by helping her bathe and helping her change her dressings, but he lost, at most, two days of work. Plaintiff testified that other people took her to her appointments and that she mostly took care of herself. Therefore, the trial court did not clearly err in refusing to invade plaintiff's settlement proceeds and distribute them as part of the marital property.

Defendant next argues that the trial court erred in finding that defendant did not use any of the Gocha Enterprises, Incorporated, loan proceeds for marital interests.

Generally, as noted above, marital assets are subject to division between the parties but the parties' separate assets may not be invaded. *McNamara*, 249 Mich App at 183. Marital assets are those assets that came to a spouse "by reason of the marriage . . ." MCL 552.19; *Woodington v Shokoohi*, ___ Mich App ___; ___ NW2d ___ (Docket No. 288923, issued May 4, 2010), slip op, p 3. "The goal of a court when apportioning a marital estate is to equitably divide it in light of all of the circumstances." *Reed*, 265 Mich App at 152. As noted above, to reach an equitable division, the trial court should consider 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. *McDougal*, 451 Mich at 89.

In this case, the trial court made the following findings of fact with regard to defendant's debt obligations:

How did Gocha Enterprises mass [sic] so much debt? That answer, like others, is not entirely clear. The Court accepts that some of the debt relates to payment of marital bills. However, the Court believes that Defendant did create obligations that had nothing to do with martial [sic] interests, but rather Gocha Enterprises. Therefore, Defendant shall be solely responsible for all debt associated with Gocha Enterprises, including but not limited to credit lines, loans and credit card debt. Plaintiff had no authority to access these debt instruments.

Defendant argues that there was no evidence in the record to support the finding that defendant used the debt for any other purpose besides marital interests.

The evidence presented at trial indicated that defendant had three separate debts: a visa credit card and a line of credit with Chase Bank, both in his name, and another line of credit with Chase Bank on behalf of Gocha Enterprises, Incorporated. The evidence in the record indicated that defendant owed \$62,000 in total: \$16,000 on the credit card, \$14,000 on the line of credit with Chase Bank in his name, and \$32,000 on the line of credit for Gocha Enterprises, Incorporated. Plaintiff's name was not on the credit card or the credit lines with Chase Bank. Defendant claims that plaintiff was a co-signer on one of the loans, but does not support his assertion with any evidence from the record. Defendant testified that he used the money to pay for gas to travel to and from work, for car parts for his son, property taxes on the marital property, the couple's insurance, mortgage payments, and expenses for Gocha Enterprises, Incorporated, such as rent, the installation of phone lines, insurance and oil. Defendant further testified that he put money in Gocha Enterprises, Incorporated, for the purpose of making money to support his family while he was unemployed. Defendant did not indicate what proportion of his debts were related to marital expenses and what were related to Gocha Enterprises, Incorporated. Plaintiff claimed that she was not aware of any of defendant's debts and would not have authorized them.

Therefore, the issue must be determined based on whether the trial court believed plaintiff or defendant with regard to whether defendant used all of the money for marital interests with the acquiescence of plaintiff or used the debt for his own purposes. "[T]his Court defers to

a trial court's findings of fact stemming from credibility determinations." *Berger*, 277 Mich App at 718. This case is particularly difficult given that the trial court found that plaintiff had "credibility issues." However, the trial court determined that Gocha Enterprises, Incorporated, was not a business and, therefore, not subject to distribution in the marital estate. Moreover, defendant asserted that part of the loans were used to pay for Gocha Enterprises, Incorporated, but provided no evidence regarding the portion of the debt that was related to marital expenses and that which was spent on Gocha Enterprises, Incorporated. Based on these facts, we cannot conclude that the trial court clearly erred in finding that not all of defendant's debt was marital property.

Defendant next argues that the property division was inequitable and unfair because plaintiff received a greater proportion of the marital estate. As noted above, on appeal from a property division in a divorce action, an appellate court must first review the trial court's findings of fact for clear error. *Berger*, 277 Mich App at 717. If the trial court's findings of fact are upheld, the appellate court must then decide whether the trial court's dispositional ruling was fair and equitable in light of those facts, and it will affirm the trial court's discretionary ruling unless left with the firm conviction that the division was inequitable. *Berger*, 277 Mich App at 717-718. To reach an equitable division, the trial court should consider 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. *McDougal*, 451 Mich at 89.

The evidence in the record indicates that plaintiff and defendant were married for 40 years, but, as the trial court found, "their marriage was generally void of overt indications of love and affection." They had three children together. During the marriage, defendant was the primary breadwinner and was responsible for paying many of the bills, including the mortgage, the utilities and groceries. It appears from the record that plaintiff did not work full-time until recently and that she primarily took care of the children. Moreover, she paid some of the expenses, including the cable bill, her car payment and clothes and supplies for their children. More recently, both plaintiff and defendant appear to be in good health and making good incomes, she as a nurse and he as a technician. Moreover, as the trial court found, neither party was at fault for the break-up of the marriage.

Based on these facts, the trial court's ruling was fair and equitable. Given that both plaintiff and defendant are employed and making sufficient incomes for their own support, alimony was fairly not awarded. Almost all of plaintiff and defendant's property was split evenly. The real marital properties, the marital home and the Belsay property, were to be sold and the proceeds split evenly between plaintiff and defendant. Plaintiff and defendant were to split plaintiff's pension, 403b account, and IRA. Plaintiff and defendant were to split defendant's Edward Jones account. They were to split evenly any money in the credit union account and any cash equivalents. They each received their life insurance policies. Each party received the personal property in their possessions including their cars.

The trial court did not split all of the property evenly, but the division was still equitable. Plaintiff received the entire balance of the joint Edward Jones account because defendant removed almost \$50,000 from the account without plaintiff's permission during the course of divorce proceedings. Defendant was assigned all of the debt he accrued in Gocha Enterprises, Incorporated, and in his personal credit card and credit line in the total amount of \$62,000, but he

also received all of his tools and, according to defendant's brief on appeal, he received all of his 401k in the amount of \$33,330. While it is true that plaintiff received all of the settlement money from her personal injury lawsuit, that money was separate property intended to compensate her for pain and suffering from a botched surgery. Based upon the record in this case, the trial court's distribution of the assets and liabilities was fair and equitable.

Defendant argues that plaintiff received 68 percent of the marital assets while defendant only received 32 percent. Defendant's computation is based in part on the value of plaintiff's car, which he claims plaintiff stated was \$26,000, in comparison to defendant's, which he claims was valued only at \$300, the \$50,000 settlement proceeds, and the \$62,000 debt. Additionally, this amount presumes that plaintiff's malpractice award was part of the marital estate. Defendant does not consider the almost \$50,000 removed by him from the couple's joint Edward Jones account during the course of the divorce proceedings in calculating the percentages, which would greatly affect his numbers. We therefore are not persuaded that plaintiff received 68 percent of the marital assets. In any event, when dividing marital property in a divorce, the court is not required to award mathematically precise shares. *Woodington v Shokoohi*, ___ Mich App ___; ___ NW2d ___ (Docket No. 288923, issued May 4, 2010), slip op, p 7. We conclude the trial court's property distribution to be fair and equitable and are not left with a firm conviction that a mistake was made. Accordingly, we affirm the trial court.

Affirmed.

/s/ Stephen L. Borrello
/s/ Mark J. Cavanagh
/s/ Donald S. Owens