

STATE OF MICHIGAN
COURT OF APPEALS

TINA LOUISE AHO,

Plaintiff-Appellee,

v

DAVID MICHAEL AHO,

Defendant-Appellant.

UNPUBLISHED
October 23, 2012

No. 304624
Ontonagon Circuit Court
LC No. 2010-000046-DO

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of divorce entered by the trial court, arguing that the court erred when it denied him full access to plaintiff's computer, failed to assign values to marital property, making it impossible to determine the size of awards and whether the division was equitable, awarded marital recreational property to plaintiff because of defendant's interest in other non-marital recreational property held with his siblings, awarded plaintiff spousal support and made it nonmodifiable (in gross), and when it awarded one of the family dogs, Finn, to plaintiff. We affirm the judgment of divorce, but remand for clarification regarding whether the award of spousal support was periodic or in gross.

Defendant first contends that he was entitled to information regarding the parties' finances and plaintiff's business holdings that was contained on plaintiff's computer. Defendant had gained physical possession of the computer; however, plaintiff alone knew the password.

"This Court reviews a trial court's decision to grant or deny discovery for an abuse of discretion." *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 224; 663 NW2d 481 (2003). A trial court abuses its discretion when a decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

We hold that the trial court did not abuse its discretion nor deny defendant his right to discovery when it imposed a reasonable condition on computer access to protect the confidential information of third parties.

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, . . . [and] [i]t is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." MCR 2.302(B)(1). "Michigan has

long supported a policy of far-reaching, open, and effective discovery practice[.]” and the rules of discovery “must be liberally construed to further the ends of justice.” *Shinkle*, 255 Mich App at 225. “A party has the same obligation to preserve electronically stored information as it does for all other types of information.” MCR 2.302(B)(5). “On motion by a party . . . , and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires[.]” including a protective order that specifies the terms and conditions of discovery, that limits the scope of discovery, that provides for a particular method of discovery, or that bars disclosure of any confidential commercial information. MCR 2.302(C)(2)-(4), (8). In divorce cases, a trial court may require that financial records be examined subject to an appropriate protective order. See *Woodington v Shokoohi*, 288 Mich App 352, 363; 792 NW2d 63 (2010).

Plaintiff indicated that, in regard to her work as a registered financial representative, she was required to password protect her computer by the Securities and Exchange Commission and that the disclosure of a client’s financial information could subject her to sanctions. Plaintiff stated that the computer contained “a backup of . . . our personal stuff,” and that “as long as I could erase my client files, [defendant] can have whatever else is on there.” The trial court stated repeatedly that it was concerned about protecting the confidentiality of financial information relative to third parties. The trial court did not rule that the information on the computer was not discoverable; to the contrary, it ruled that “the information [defendant is] looking for can be requested” and “if that information is on that computer, [defendant is] entitled to have that data, but not to have access to everything.” The court ruled that defendant had the option of returning the computer to plaintiff so that she could retrieve the parties’ discoverable information from it and then pass it on to defendant, but the court would not compel plaintiff to divulge the password, which would have given defendant unlimited access to information on the computer. Defendant failed to exercise the option of returning the computer to plaintiff. The court further noted that the information sought by defendant was also covered in his interrogatories to plaintiff, and defendant fails to even argue on appeal that plaintiff’s answers to interrogatories were insufficient. The trial court placed a valid condition on discovery to protect the confidential financial information of third parties that was stored on the computer as a result of plaintiff’s work as a registered financial representative. The court did not deny defendant the opportunity to discover the information he was seeking. Accordingly, there was no abuse of discretion.

Defendant next argues that the trial court clearly erred when it failed to make findings of fact in regard to the value of marital property, where the parties strongly contested the values at trial. Because of this failure, according to defendant, the parties cannot determine the approximate value of their individual awards in the case and whether the distribution was equitable. Defendant also maintains that plaintiff’s testimony on the values of property was not entitled to any weight.

This Court reviews a trial court’s division of marital property by reviewing its findings of fact for clear error and then determining whether the trial court’s dispositional ruling was fair and equitable in light of the facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). A trial court must make specific findings in regard to the value of marital property that is being awarded in a judgment if the value is in dispute, and a court commits clear error when it fails to place a value on disputed property. *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d

64 (2003); see also *Woodington*, 288 Mich App at 364 (value findings “are inadequate if they are not sufficiently specific to enable the parties to determine the approximate values of their individual awards by consulting the verdict”). In *Woodington*, this Court stated that “the trial court’s failure to make findings as to the relevant factors for dividing property, and its failure to assign a value to several assets . . ., leave this Court and the parties unable to assess whether the marital division was equitable.” *Id.* at 369.

Here, the trial court failed to place values with respect to the parties’ real property and various items of personal property, even though the value of these properties was disputed and the parties offered vastly divergent values. The court decided not to assign values to the property, as it found that doing so was unnecessary to make a fair and equitable distribution of the marital estate. The trial court clearly erred in failing to attribute values to the marital property; however, because we can assess from the record, operating under the assumption that the values given by the appealing defendant were accurate, that the division of property was fair and equitable, reversal is unnecessary.

With respect to the marital home, which had an outstanding mortgage of \$135,000, was in foreclosure, and which defendant valued at approximately \$95,000, the trial court ordered the parties to hold the property as tenants in common, with any proceeds or debt that existed following a sale to be split equally between the parties. This was fair and equitable. With respect to the adult foster care (AFC) home operated by plaintiff, it had a debt of approximately \$95,000 and defendant valued the AFC home at \$75,000; therefore, it had a negative equity. The court awarded the AFC home to plaintiff, as well as three rental real properties, because the properties generated income for plaintiff, and plaintiff’s total annual income was just below \$30,000, which was derived from running the AFC home, managing the leaseholds, and working as a financial representative. Defendant’s gross income in 2010, which did include much overtime, totaled approximately \$110,000. Given the negative equity in the AFC home under defendant’s own valuation, the award of the home to plaintiff did not create any unfairness or inequality as to defendant and the property distribution.

The rental house on Chippewa Street had a balance owing of approximately \$18,000 under a land contract, and defendant’s expert placed the value of the house at \$29,000. Approximately \$5,000 was owed under a land contract in regard to the rental house on Michigan Street, and defendant valued that property at \$18,000. No debt was owing on the rental house on Copper Street, and defendant valued the house at \$27,000. Thus, by defendant’s own valuation numbers, the equity in these three rental properties awarded to plaintiff was approximately \$51,000. The trial court’s distribution theory was, as mentioned above, to award the real properties to plaintiff because they were the source of part of her income or, as framed by the court, the “tools of her trade,” while conversely, the tools of defendant’s trade included heavy equipment, a large number of tools, and other mechanical materials, which the court awarded entirely to defendant. This included a bulldozer, backhoe, and a six-wheeler, which defendant valued at \$1,500 a piece, along with tools and equipment that he valued at \$2,000. In regard to the tools, the court did express, “I would value [them] at much higher than \$2,000.” Also included was a John Deere tractor that defendant claimed was worth at least \$10,000. Defendant was also awarded a classic 1966 Chevelle Super Sport that his expert opined had a value of \$13,500. Even assuming that the trial court was incorrect in believing the tools and equipment were worth more than \$2,000, which tools and equipment included generators and engine hoists,

and which plaintiff asserted were numerous enough to operate a vehicle repair shop, the items discussed above amounted to approximately \$30,000. When viewed in connection with the equity in the rental properties, and recalling that the AFC home had a negative equity, the distribution was fair and equitable, especially considering that strict mathematical formulations are not required, *Sparks*, 440 Mich at 159, and that the parties' circumstances called for the type of division utilized by the court.¹

One more parcel of real property that needs to be addressed is the camp property that was awarded to plaintiff and valued by defendant at \$31,800, with apparently no outstanding debt associated with the property. The court awarded plaintiff the property because "even though it's not presently an asset of the marriage, [defendant] does have an interest in the M-64 property that is held with his . . . siblings, so he does have a recreational area or place to go in this community." This other recreational, non-marital property consisted of 300 feet of Lake Superior frontage with a cabin. Defendant argues that he is entitled to an offset.

When the trial court distributes marital property, it may consider what is equitable "in light of all the circumstances." *Cunningham v Cunningham*, 289 Mich App 195, 201; 795 NW2d 826 (2010). The trial court need not limit its consideration to the standard property division factors, which do include "general principles of equity," but may also consider "additional factors that are relevant to a particular case." *Sparks*, 440 Mich at 159-160.

Plaintiff testified that she was not making a claim on the Lake Superior property. Defendant testified that the property was "a resort area" owned jointly with his two brothers and sister. The trial court clearly recognized that the Lake Superior property was not a marital asset, and it simply took it into consideration in regard to who should be awarded the camp property. The court did not consider the Lake Superior property as part of the allocation of assets; rather, contemplation of that property and its nature merely served as a reason to award the camp property to plaintiff. Because we conclude that the overall division of the marital estate was generally equitable, the fact that the court took into consideration that defendant had access to recreational property and that plaintiff would not have similar access absent the award did not render the property disposition inequitable.

Defendant next argues that the trial court erred in making the award of spousal support – \$1,000 per month for seven years – nonmodifiable. Defendant also appears to contend that the award should be reduced because it is not realistic to assume that he will continue working all of the overtime hours that he had recently been accepting.

First, reduction of the spousal support award is unwarranted. This Court must affirm the trial court's decision regarding spousal support unless it is firmly convinced that the disposition was inequitable. *Olson*, 256 Mich App at 630. Here, the trial court made findings on each of the relevant spousal support factors. *Id.* at 631. The court made the award of \$1,000 a month for

¹ Given our analysis in which we considered only defendant's valuations, it is unnecessary to address defendant's argument that plaintiff's valuations should not have been given any credit or weight.

seven years primarily because of the disparity in the parties' income and because of plaintiff's health. The trial court's findings of fact were not clearly erroneous. *Id.* at 629. Defendant's 2010 income was about \$110,000, while plaintiff's 2010 income was under \$30,000. Plaintiff testified that healthcare through COBRA would cost \$588 per month for basic care and that she had a variety of health issues, including arthritis. The fact that a portion of defendant's wages resulted from overtime hours does not render the award inequitable.

With respect to the nature of the spousal support award, this Court reviews de novo questions of law in divorce actions. *Cunningham*, 289 Mich App at 200. The judgment of divorce provides that the spousal support award is "non-modifiable" and that "[a]ll payments of spousal support shall be reportable as income for Plaintiff and deductible by the Defendant." The uniform spousal support order entered in this case contains the same language regarding tax ramifications. Under MCR 3.211(D)(1), a uniform support order (USO) pertaining to child or spousal support "shall govern if the terms of the judgment . . . conflict with the [USO]."

Periodic alimony "is designed to provide support and maintenance rather than to distribute property," which would be alimony in gross, and "only periodic alimony is subject to modification[;] [a]limony in gross is nonmodifiable." *Friend v Friend*, 486 Mich 1035; 783 NW2d 122 (2010). When a USO indicates that alimony payments are deductible to the payer and that the payments are to be included in the payee's income, "[t]his suggests that the award is periodic alimony because alimony in gross is not a taxable event to the payee. However, periodic alimony is taxable to the payee." *Id.* When there are no contingencies such as death or remarriage, this suggests alimony in gross because "[p]eriodic alimony is typically terminated on the death or remarriage of the recipient[;] [a]limony in gross is not." *Id.* When the trial court's award of spousal support is unclear as to whether the trial court intended the spousal support to be in gross or periodic, a remand for clarification is necessary. *Id.* In *Friend*, the Court remanded the case to the trial court for clarification whether the alimony award was intended to be alimony in gross or periodic alimony "in light of the conflicting directions the circuit court gave when rendering its spousal support award." *Id.*

Here, the nonmodifiable language in the divorce judgment and lack of contingencies suggest alimony in gross, but the tax-ramification language in the judgment suggests periodic alimony, as does the USO. While MCR 3.211(D)(1) could arguably dictate a conclusion that the award was periodic alimony subject to modification, the USO in *Friend* had the same language regarding tax consequences, yet the Court remanded for clarification. Accordingly, we do the same here and remand for clarification regarding whether the spousal support award was intended to be periodic or in gross. To the extent that defendant's argument concerning overtime hours was part of an argument challenging the entry of a spousal support award in gross, i.e., nonmodifiable,² we decline to address the argument as the trial court needs to clarify whether the spousal support award was indeed in gross or periodic.

² Defendant appears to be contending that because overtime work may not always be available in the future or feasible given his age, the award of spousal support should have been periodic and modifiable.

Finally, defendant argues that the court applied the wrong standard, a best-interest standard, when awarding Finn the dog to plaintiff instead of treating the dog as chattel for purposes of property division. The trial court expressly acknowledged that a dog is personal property in the eyes of the law, and it was defendant who spoke of custody-like terms below when it came to Finn. Animals are generally regarded as personal property in Michigan. *Koester v VCA Animal Hosp*, 244 Mich App 173, 176; 624 NW2d 209 (2000). Defendant did not have an interest in being awarded the parties' other animals, and the trial court found that awarding Finn to plaintiff was proper in order to keep all of the animals together. We find nothing unfair or inequitable about the court's ruling.

We affirm the judgment of divorce, but remand for clarification regarding whether the award of spousal support was periodic or in gross. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Joel P. Hoekstra