STATE OF MICHIGAN

COURT OF APPEALS

ANNE GLASGOW SEPPA,

Plaintiff-Appellee,

v

CRAIG ARTHUR SEPPA,

Defendant-Appellant.

UNPUBLISHED
August 16, 2007

No. 268228
Jackson Circuit Court
LC No. 04-005456-DM

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of divorce entered by the circuit court. We affirm.

Defendant's first claims the court erred by awarding plaintiff certain real property that was formerly in the marital estate.

Before defendant filed for bankruptcy, he quitclaimed his interest in certain real property to plaintiff and the parties' children. The trustee challenged the transfer, and plaintiff contacted an attorney to draft an agreement in which plaintiff would agree to be responsible for the payments on the mortgage obtained to satisfy the demands of the bankruptcy trustee. In exchange, defendant agreed to give up his dower and equitable interests in their marital property. Plaintiff's attorney accordingly drafted a Property Agreement, which both parties signed. Defendant later sent a letter to the attorney purporting to "rescind" his signature from the Agreement, citing his wife's "false" statements about the "future of [their] relationship" and his mental instability, as well as his lack of legal representation at the time of his signature.

Defendant cites MCL 552.19 as support for his argument that "the titling of assets and [a determination as to] which spouse is legally responsible for liabilities is generally ignored upon the dissolution of the marriage." However, defendant's interpretation of the statute lacks merit. MCL 552.19 states:

> Upon the annulment of a marriage, a divorce from the bonds of matrimony or a judgment of separate maintenance, the court *may* make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party by

> reason of the marriage, or for awarding to either party the value thereof, to be paid by either party in money. [Emphasis added.]

The statute provides only that the court may make a judgment that restores to one party the property that has been held by one of the parties by reason of the marriage. The statute does not state that a court is to ignore the existing distribution of property in the marriage, as defendant claims. Furthermore, in the instant case, the real property at issue was not merely held by plaintiff, but there were at least two documents—the quitclaim deeds and the Agreement—verifying her exclusive interest in it.

This Court has held that:

> The validity of property settlements reached through negotiations is generally upheld in the absence of fraud, duress, or mutual mistake. Consent judgments reached by agreement of the parties differ from litigated judgments reached after trial on the merits. The former primarily rest on the consent of the parties, rather than upon the judgment of the court, and generally cannot be set aside without the approval of the parties thereto. [*Van Wagoner v Van Wagoner*, 131 Mich App 204, 209; 346 NW2d 77 (1983), quoting *Madden v Madden*, 125 Mich App 54, 58-59; 336 NW2d 231 (1983), rev'd on other grounds 419 Mich 858 (1984) (Quotation marks omitted).]

Defendant has not shown that he signed the Agreement as a result of fraud, duress, or a mutual mistake between himself and plaintiff. In fact, plaintiff's attorney testified that defendant was the impetus behind the drafting of the Agreement and that plaintiff sat "passively" throughout most of the negotiations. He also reported that defendant contacted him after their initial meeting with changes, which were incorporated into the document. Defendant seems to have been a fully participatory party with respect to the drafting of the Agreement, and it should not be set aside in the absence of evidence indicating it was fraudulent or otherwise invalid.

Defendant next argues that the court erred in holding that business debts accumulated during the marriage were defendant's sole business debt. In a handwritten letter admitted into evidence by plaintiff, defendant wrote that he gave plaintiff "all my interests in our homestead we build [sic] together. You relinquish any interest you might have in the two commercial properties now or in the future." Defendant also signed the agreement, which provided that plaintiff "had no involvement in [defendant's] business which resulted in this liability. The Settlement Agreement provides that Anne [plaintiff] is being released from any liability and claims of Craig's [defendant's] creditors . . . ." The record clearly demonstrates that defendant intended to operate his businesses without plaintiff's involvement in any capacity.

Defendant attempts to argue that because plaintiff enjoyed the financial well-being that went with his business success, she should also take part in the demise of his business fortunes; however, this argument is not supported by precedent. In *Dougherty v Dougherty*, 48 Mich App 154; 210 NW2d 151 (1973), this Court wrote that the plaintiff-wife need not share in the debts incurred by her husband's business simply because the business had been profitable during the marriage:

> [A] settlement awarding business property entirely to one party as opposed to the other may be justified by the particular circumstances involved. In *Whittaker v Whittaker*, 343 Mich 267; 72 NW2d 207 (1955), . . . the Court sanctioned a property settlement awarding the husband an indebted business in which the debts exceeded the assets.
>
> The challenged property settlement [in the instant case] resulted from the segregation of the nursery business from the real estate and an allocation of the indebted business to the husband. The record discloses evidence that the business was profitable at the time that plaintiff, encouraged by defendant, discontinued her participation therein and that a majority of the debts were incurred subsequently by defendant individually. . . . The evidence supports the trial judge's conclusion that the nursery business was owned and operated by defendant individually. The final property settlement resulted in a substantial amount of defendant's liability being reduced by the resulting property conveyance. . . . The property division placing the onus of the business's deteriorating financial condition upon defendant is neither inequitable nor unjust. [*Dougherty, supra* at 160-161 (Citations omitted).]

Here, the court found that defendant had used $334,313.59 to pay his business debts in the bankruptcy proceeding. In light of defendant's explicit agreement to be responsible for his business debt, and the relevant case law providing that such agreements may be equitable in certain circumstances, defendant's claim should fail.

Defendant next argues that the court erred by finding that certain private accounts belonged to plaintiff separately. In support, defendant cites MCL 552.23 and 552.401 for the proposition that the Legislature authorizes a divorce court to "potentially invade and distribute separate property." Defendant argues that the court should have done so in the instant case because of defendant's "physical and mental problems" and his present and future "limited ability to support himself." Plaintiff argues that defendant will likely not be a consistent or reliable contributor to their children's support, and thus should not be awarded any additional funds from her estate.

MCL 552.23 states, in pertinent part:

> Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage as are committed to the care and custody of either party, the court *may* further award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case. [Emphasis added.]

MCL 552.401 states, in relevant part:

> The circuit court of this state *may* include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property. [Emphasis added.]

The Legislature's language in both passages of these statutes is permissive rather than mandatory, leaving the decision on whether to award property owned by a party to his or her spouse to the circuit courts. The factors which a court should consider in determining whether to order such a distribution are outlined in the statutes, and include whether a party can pay, "the character and situation of the parties," and the circumstances of the case. Defendant has not shown that plaintiff has the financial ability to part with any of her inheritance in light of her responsibilities. Plaintiff testified at trial that her monthly expenses exceed her monthly income and that she has had to seek help from friends in order to remain current on her property taxes. Further, defendant was working at the time of trial, and his occupational therapist testified that he should be able to continue to work in the future. Thus, it was not error for the court to refuse to award defendant the proceeds of the accounts at issue.

Another question defendant raises is whether the money in plaintiff's accounts was truly kept separate such that it should not be considered part of the marital estate. MCL 557.21(1) provides that,

> [i]f a woman acquires real or personal property before marriage or becomes entitled to or acquires, after marriage, real or personal property through gift, grant, inheritance, devise, or other manner, that property is and shall remain the property of the woman and be a part of the woman's estate. She may contract with respect to the property, sell, transfer, mortgage, convey, devise, or bequeath the property in the same manner and with the same effect as if she were unmarried. The property shall not be liable for the debts, obligations, or engagements of any other person, including the woman's husband, except as provided in this act.

Although the statute does not protect a wife's property from being joined with that of her husband pursuant to a property division in a divorce action, "[n]ormally, property received by a married party as an inheritance, but kept separate from marital property, is deemed to be separate property not subject to distribution." *Dart v Dart*, 460 Mich 573, 584-585; 597 NW2d 82 (1999); see also *Charlton v Charlton*, 397 Mich 84, 91-92; 243 NW2d 261 (1976).

Defendant argues that plaintiff's property was no longer truly separate because she used portions of her various inheritances to pay marital debts or expenses. Relevant case law indicates that the decision whether to include an inheritance as part of the marital estate is discretionary and depends upon the circumstances of a case. *Demman v Demman*, 195 Mich App 109, 112; 489 NW2d 161 (1992). In Charlton, the Court observed that a court could reasonably decide that the portion of the wife's otherwise separate inheritance that "was used towards the purchase and improvement of the family homes" should be included as part of the marital estate. *Charlton, supra* at 94. Based on our Supreme Court's observation in that case, the court did not err in its decision not to consider the portion of plaintiff's separate estate not

used for marital purposes as joint marital property, and for refusing to award defendant part of plaintiff's separate property.

Defendant last argues that court erred in determining his child support obligation by imputing an income from the last year in which he provided evidence of his income.

The court agreed with plaintiff that defendant's income should be imputed as $58,786, his gross income in 2002, as defendant did not provide information regarding his income in either 2004—the year immediately preceding trial, or 2005, the year of the trial. The court noted the testimony of defendant's treating psychiatrist and his occupational therapist on defendant's mental and physical condition as well as his ability to work. Despite the testimony of defendant's occupational therapist that she did not believe defendant could fake his memory problems given the type of tests she administered to him, the court,

> Noted that his memory problems during his testimony appeared to be selective. He could recall details about [the parties'] property and his business but claimed to not remember other things. [Further,] [t]he timing on his seeking treatment for the depression is suspect. . . . This Court is not convinced that [defendant's] ability to work is as diminished as his Attorney argues. The Court finds it reasonable to impute him [sic] at income of $58,786 which he earned in 2002 for purposes of both child support and spousal support.

Defendant's argument that a court may only impute income to a party where that party has voluntarily left his or her employment is problematic. Defendant cites *Rohloff v Rohloff*, 161 Mich App 766; 411 NW2d 484 (1987), for the position that "an imputation of income can only be based upon a finding of a voluntary reduction of income." However, *Rohloff* states that "where a party voluntarily reduces his or her income, or . . . voluntarily eliminates his or her income, and the trial court concludes that the party has the ability to earn an income and pay child support, we do not believe that the trial court abuses its discretion by entering a support order based upon the unexercised ability to earn." *Id.* at 775-776. Thus, the *Rohloff* Court did not hold that a voluntary termination or reduction in income were the only circumstances in which a court could permissibly impute an income to the party in question, as defendant contends, and defendant does not cite other authority for this proposition.

Moreover, this Court has previously stated that "[i]t is clear that a parent's income does not determine his or her duty to pay child support. The court may take into consideration the parent's ability to work and earn money, and award child support even though the parent owns no property." *Heilman v Heilman*, 95 Mich App 728, 733; 291 NW2d 183 (1980). Our Supreme Court has further stated that it "is essential to ensure that any imputation of income is based on an actual ability and likelihood of earning the imputed income. Any other rule would be pure speculation and a clear violation of the requirement that child support be based upon the actual resources of the parents." *Ghidotti v Barber*, 459 Mich 189, 199; 586 NW2d 883 (1998), citing MCL 552.519(3)(a)(iv). Defendant in the instant case has the ability to work, according to his occupational therapist and according to plaintiff's witnesses who had worked with or employed him recently at the time of trial. The court based its findings on defendant's actual earnings for

the only year from which data as to his income was available. In these circumstances we conclude that the court did not clearly err in imputing an income to defendant.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K. Zahra