STATE OF MICHIGAN

COURT OF APPEALS

MELISSA MARIE TOPELIAN, Plaintiff-Appellee,	UNPUBLISHED July 13, 2006
v	No. 259814 Monroe Circuit Court
MICHAEL CHARLES TOPELIAN, Defendant-Appellant.	LC No. 02-027914-DM

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

In this divorce case, defendant appeals as of right the trial court's order distributing the marital estate. We affirm, but remand for an evaluation of the award of attorney fees.

In divorce cases, we review the trial court's findings of fact for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding is clearly erroneous if, after reviewing the record, we are left with the definite and firm conviction that a mistake was made. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If the trial court's findings are upheld, we then decide whether the dispositional ruling was fair and equitable in light of the facts. *Sparks, supra* at 151-152. The ultimate dispositional ruling will be affirmed unless we are left with the firm conviction that it was inequitable. *Id*. at 152. This case also involves questions of law and statutory application. We review de novo matters of statutory application, *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002), as well as other questions of law, *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005).

I. Spousal Support

Defendant first argues that the trial court made insufficient findings of fact before awarding $60,000 in non-modifiable spousal support. Defendant asserts that the trial court failed to consider the ability of the parties to work, the source and amount of property awarded to the parties, the ability of the parties to pay alimony, and the needs of the parties. This argument is without merit.

In a divorce action, the trial court must make findings of fact before making its dispositional rulings. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without

overelaboration of detail or particularization of facts." MCR 2.517(A)(2). This rule does not require a trial court to recite all the evidence considered, and the trial court's failure to mention a particular fact does not necessarily imply that it was ignored. *Fletcher v Fletcher*, 447 Mich 871, 883-884; 526 NW2d 889 (1994).

Contrary to defendant's argument, the record plainly indicates that the trial court did consider the relevant factors. Although the court may not have done so in detail, the court made sufficient findings. Regarding the source and amount of property awarded to the parties, there was no reason for the court to make additional findings because the terms of the property distribution had already been addressed on the record. Additional findings would have been merely duplicative. With respect to the ability of the parties to pay alimony and the needs of the parties, the court commented that defendant's income was "substantially more" than that of plaintiff throughout the marriage. Specifically, the court found that defendant had earned on average twice as much as plaintiff during the marriage, having earned between $72,000 and $81,000 in the previous year. The court also found that the parties' monthly expenses were similar, except that plaintiff had additional expenses due to her custody of the children. Defendant's argument that the court did not consider these factors is without merit. Finally, although the court did not explicitly address the ability of the parties to work, it did find that both parties had worked throughout the marriage and that both parties were currently employed. This was tantamount to a finding that both parties were able to work. The court made sufficient findings regarding the relevant spousal support factors in this case.

Defendant also argues that the trial court improperly characterized the $60,000 award of spousal support as non-modifiable. We disagree. Spousal support may fall into one of two categories; it may be classified as either alimony in gross or periodic alimony. *Staple v Staple*, 241 Mich App 562, 566; 616 NW2d 219 (2000). An award of periodic alimony is modifiable upon a showing of change in circumstances by either party. MCL 552.28. However, alimony in gross is not modifiable. *Staple, supra*. "Alimony in gross is a sum certain and is payable either in one lump sum or in periodic payments of a definite amount over a specific period of time." *Bonfiglio v Pring*, 202 Mich App 61, 63; 507 NW2d 759 (1993). Alimony in gross is not subject to modification, absent a showing of fraud. *Edgar v Edgar*, 366 Mich 580, 587; 115 NW2d 286 (1962); *Bonfiglio, supra* at 63.

The trial court awarded plaintiff $60,000 in spousal support, "to be made in sixty equal installments of one thousand dollars each per month." The court provided that the monthly payments were to continue "until said entire sum is paid." Thus, the award of $60,000 was certain and definite, and was not conditioned on the occurrence or nonoccurrence of any future events. The $60,000 award was alimony in gross, and was properly characterized as non-modifiable. *Id.*

Defendant next contends that the trial court inequitably awarded plaintiff $5,000 that had been set aside to cover the cost of a forensic accounting. Defendant provides only one sentence of argument with respect to this issue, and cites no authority for his position. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . nor may he give issues cursory treatment with little or no citation of supporting authority." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Therefore, we consider this issue abandoned.

Nonetheless, the award of $5,000 to plaintiff was proper. Defendant initially set aside $5,000 pursuant to a trial court order to pay for a forensic accounting "in the event that it is ordered." The trial court never ordered an accounting, and the $5,000 was therefore never used for that purpose. The court granted plaintiff the $5,000 amount, as well as $49,000 in retirement savings that she had earned during the marriage. The court suggested that these amounts were part of the spousal support award rather than the distribution of property.

The award of spousal support and the distribution of marital assets are interrelated concepts that go "hand in glove." *Jansen v Jansen*, 205 Mich App 169, 172; 517 NW2d 275 (1994). The main purpose of spousal support is to balance the incomes and needs of the parties without impoverishing either party. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). Here, the court recognized that the $60,000 award of spousal support in gross would not equalize the parties' incomes. Indeed, in order to truly equalize the parties' incomes, the court noted that it would have to double the $60,000 award over the course of sixty months. In lieu of doubling the amount, the court granted plaintiff the $5,000 and $49,000 assets as part of the spousal support award. Under the circumstances, these awards to plaintiff as additional spousal support were not inequitable.

II. H&R Block Stock Account

Defendant next argues that the trial court erred by including the joint H&R Block stock account in the marital estate and by dividing it between the parties. We disagree. The trial court's first task when dividing property is to determine whether assets are marital or separate in nature. *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997). Generally, the marital estate is divided between the parties, but each party takes away from the marriage that party's own separate estate. *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002).

The evidence established that at the time of the marriage, defendant owned one H&R Block stock account, held solely in his name, containing roughly $171,000. The evidence further showed that between the date of marriage and late 1999, defendant continued to hold this H&R Block account in his name only. But, in late 1999, defendant took a substantial number of assets from the individual H&R Block account and used them to form a second H&R Block stock account, which was titled jointly in both parties' names. Defendant contends that because the second H&R Block stock account was formed exclusively with assets from the first H&R Block account, it should have been classified as separate property.

Defendant cites *Reeves v Reeves*, 226 Mich App 490; 575 NW2d 1 (1997), and *Korth v Korth*, 256 Mich App 286; 662 NW2d 111 (2003), for the proposition that all property owned by one party before the marriage is that party's separate property. However, this is a misreading of the law. We held in *Reeves* and *Korth* that when one spouse had owned property since before the marriage, the other spouse was entitled only to the increase in that property's value since the date of marriage. However, we also held that in the case of jointly held property, the increase in value between the date of marriage and the date of divorce was properly included in the marital estate. Contrary to defendant's overbroad argument, *Reeves* and *Korth* do not stand for the proposition that all assets owned by one party prior to the marriage are separate property.

Moreover, where otherwise-separate property has been commingled or used for joint purposes, courts may include that property in the marital estate. See e.g., *Polate v Polate*, 331 Mich 652, 654-655; 50 NW2d 190 (1951). See also *Dart v Dart*, 460 Mich 573, 584-585; 597 NW2d 82 (1999). Here, the evidence established that defendant intended the joint H&R Block account to be a marital asset. Although defendant testified that he believed the account remained a separate asset, his actions indicated otherwise. First, defendant titled the joint H&R Block account in both parties' names when he established it in late 1999. Further, the evidence showed that defendant withdrew assets from the joint account for marital purposes, such as marital bills, joint taxes, family vacations, and the addition of a deck onto the marital home. Finally, uncontradicted testimony revealed that after establishing the joint H&R Block account, defendant stopped contributing any portion of his paychecks toward the marital estate. This evidence suggests that defendant intended the joint H&R Block account as a substitute for his previous marital contributions.[1] The trial court did not clearly err by including the joint H&R Block account in the marital estate. Therefore, we are not left with the firm conviction that the division of this asset was inequitable. *Sparks, supra* at 152.

III. Converted Assets

Defendant argues that the trial court erred in determining that he concealed or converted three marital assets, including $37,000 in 2000, $10,000 in 1989, and $13,400 in 2000. We disagree.

Defendant admitted at trial that he wrote himself a $37,000 check out of the parties' joint checking account in 1989. Defendant asserted that he cashed the check, used the proceeds to repay a substantial debt to his mother, and gave his sister a loan. Defendant's mother and sister corroborated this assertion at trial. However, defendant's trial testimony was inconsistent with certain pretrial statements he had made during discovery. Further, defendant admitted on cross-examination that he had purchased a significant quantity of stock for himself on the day after he cashed the $37,000 check.

Having heard the testimony, the trial court determined that defendant had converted $37,000 in marital funds from the parties' joint checking account. The court found that defendant's testimony regarding the $37,000 check and the subsequent payments to his mother and sister was incredible, and that defendant had actually used the funds for some other purpose.[2]

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[1] Defendant submits that the *Polate* decision was implicitly overturned by our decisions in *Reeves* and *Korth*. This Court may not modify or overturn precedent of the Michigan Supreme Court. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). Because our Supreme Court has not overturned its decision or reasoning in *Polate*, that case and its progeny continue to be good law.

[2] Defendant asserted that the alleged payment to his mother was a repayment for personal, premarital loans, and that the alleged payment to his sister was a loan. Thus, defendant essentially admitted that these alleged payments to his mother and sister were non-marital in nature. Accordingly, the trial court's finding that defendant was lying with respect to the $37,000 is actually irrelevant.

Regardless of whether defendant actually used the $37,000 to pay his mother and sister, he essentially admitted that he had used the funds for a non-marital purpose. Thus, the trial court's determination that defendant converted $37,000 in marital assets was not erroneous. *Sparks, supra* at 151.[3]

Next, defendant testified regarding $10,000 in marital funds that he apparently withheld from various paychecks. Defendant had stated in response to plaintiff's interrogatories that he used the $10,000 to purchase a treasury bill in 1989. However, at trial defendant suggested that he had not purchased anything with the funds, and had deposited them into the parties' joint checking account. On cross-examination, defendant then admitted that he may have spent the funds, but could not exactly remember. The trial court noted that defendant "had two or three stories as to what happened with [the $10,000]." The court found that defendant had not deposited the funds into the joint account, and that he had converted $10,000 in marital assets. In divorce cases, the trial court has the best opportunity to view the demeanor of the witnesses and weigh their credibility. *Stoudemire v Stoudemire*, 248 Mich App 325, 339; 639 NW2d 274 (2001). Thus, we give special deference to the trial court's findings when they are based on the credibility of the witnesses. *Draggoo, supra* at 429. The court's conclusion that defendant converted $10,000 in marital assets in 1989 was not clearly erroneous.

Defendant then testified that he sold stock worth approximately $13,400 in 2000. At no time did defendant contest the court's finding that this stock was a marital asset. Rather, defendant testified that he had deposited the $13,400 in proceeds directly into the parties' joint checking account. However, on cross-examination defendant admitted that he had lied about depositing the money into the joint account, stating that he could not remember where the money

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[3] Defendant now suggests, for the first time on appeal that the $37,000 had been his separate property because it represented the proceeds from a sale of premarital stock that he had earlier deposited into the joint checking account. Thus, defendant argues that regardless of the purpose for which he used the $37,000, it was his own separate property. There was no testimony on this matter below, and defendant's new argument is an impermissible attempt to expand the record on appeal. See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Moreover, even if this assertion had been introduced below, the new argument is unavailing. As noted, once separate property is commingled or used for joint purposes, a court may classify it as marital property in certain circumstances. *Polate, supra* at 654-655. Defendant asserts in his brief on appeal that the sale of premarital stock generated $21,384, which he immediately deposited into the joint account. Thus, at most, only $21,384 of the $37,000 check could have possibly represented proceeds of the stock sale. The remainder of the check's amount, $15,616, would have represented marital assets from the joint checking account at large. Even if the new assertion made by defendant is true, $21,384 in separate assets were necessarily commingled with $15,616 in marital assets as soon as defendant cashed the $37,000 check. The total $37,000 check would therefore still be properly included in the marital estate. *Polate, supra*.

had gone. In light of defendant's admission that had used this $13,400 for his own use, the court's finding that defendant had converted the funds was not clearly erroneous. *Id*.[4]

IV. Attorney Fees

Finally, defendant challenges the trial court's order awarding plaintiff $10,000 in attorney fees. We review for an abuse of discretion a trial court's decision to award attorney fees in a divorce action. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). Attorney fees are authorized when the party requesting the fees has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). As is clear from the evidence presented at trial, defendant was uncooperative with the trial court, ignored several discovery requests, failed to disclose certain assets, and attempted to convert certain marital property. The trial court found that defendant's actions prolonged the proceedings and rendered the litigation more costly than it otherwise would have been. For these reasons, the trial court was justified in granting attorney fees to plaintiff. *Id*.

However, a determination that a party is entitled to attorney fees does not decide the amount of the award. *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982). In determining the reasonableness of attorney fees, a trial court should consider the professional standing and experience of the attorney, the skill and labor involved, the amount in question and the results achieved, the difficulty of the case, the expenses incurred, and the nature and length of the professional relationship with the client. *Zdrojewski v Murphy*, 254 Mich App 50, 72; 657 NW2d 721 (2002). Generally, the trial court should hold an evidentiary hearing on the reasonableness of attorney fees. *B & B Investment Group v Gitler*, 229 Mich App 1, 15-16; 581 NW2d 17 (1998). No hearing is necessary when there is an otherwise-sufficient record to support a finding of reasonableness. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). However, even if no hearing is held, the court must fully

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[4] Defendant also alleges that the trial court did not have jurisdiction to render a decision regarding the status of a life insurance policy valued at $19,000 and the savings bonds. At trial, defendant conceded that the proceeds of the insurance policy should be utilized for the children's college education. Also at trial, defendant conceded that savings bonds bearing his name (as a precaution) were not equitably divided among the minor children. The parties deliberately submitted these issues to the trial court for resolution. On appeal, defendant alleges that these assets should be awarded to him. A party may not harbor error as an appellate parachute. *Hilgendorf v St John Hosp*, 245 Mich App 670, 683; 630 NW2d 356 (2001). That is, a party may not assign error on appeal to an issue that counsel deemed proper at trial. Moreover, the trial court did not err in concluding that plaintiff should supervise these assets that were essentially awarded to the children at the parties' request. The trial court held that defendant lacked credibility and hid assets. Under the circumstances, the trial court's order of care of the children's college fund to plaintiff was proper. Moreover, the court ordered that these assets could not be withdrawn without petitioning the court. In light of the concessions by defendant in the trial court and the court's opinion providing for continuing jurisdiction over the assets by requiring that any disbursement occur by court petition only, defendant's challenges are without merit.

explain the reasons for its decision. *Id*. Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit. *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). However, a party should not be required to invade assets to satisfy attorney fees particularly where the party is relying on the same assets for support. *Id*.

Here, the trial court awarded plaintiff's request for $10,000 without holding an evidentiary hearing. Nor did the court provide any reasoning for its decision to grant $10,000 in attorney fees. The court did observe that the award was to be used to pay both plaintiff's current and former attorney, but it failed to make any findings or state any reasons with respect to the amount. Although the court properly determined that attorney fees were awardable on the basis of defendant's conduct, the court did not make an assessment regarding the propriety of the amount.[5] The trial court also did not determine whether plaintiff would be forced to invade her own assets to pay her own attorney fees. On remand, the court shall consider the proper factors and award reasonable attorney fees. *Id*.

Affirmed, but remanded. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto

[5] It is possible that $10,000, or perhaps even more, was in fact reasonable. However, in the absence of sufficient evidence, we express no opinion as to the reasonableness of that amount.