

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT D. HAUSBECK,

Plaintiff-Counterdefendant-
Appellant,

v

DENISE M. HAUSBECK,

Defendant-Counterplaintiff-
Appellee.

UNPUBLISHED

September 18, 2007

No. 268561

Tuscola Circuit Court

LC No. 00-019291-DM

Before: O’Connell, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right in this divorce action that involved issues of property division, spousal support, child support, and attorney fees. We affirm.

Plaintiff and defendant were married on February 24, 1990. The parties have three children. Defendant moved out of the marital home in September 2000, and this action was filed that same month.

On appeal, plaintiff first challenges the trial court’s division of the parties’ assets. The trial court’s findings of fact, including the valuation of assets, must be reviewed for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). “The court’s dispositional ruling should be affirmed unless this Court is left with the firm conviction that the division was inequitable.” *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005).

“In dividing marital assets, the goal is to reach an equitable division in light of all the circumstances.” *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). The division of property is not governed by a rigid set of rules and the determination of relevant factors will vary with the facts and circumstances of each case. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

In order to divide the marital estate, the court must first distinguish between marital and separate assets. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). In this regard, plaintiff asserts that the trial court erred by concluding that the equity he had in his Block Road home, which he purchased before the marriage, and which, upon sale, generated proceeds

used as a down payment on the parties' current marital home, had become merged or commingled with the marital property such that it was no longer separate property. The parties' separate assets are not generally subject to division. *McNamara, supra* at 183. However, separate assets may be redistributed if one of two statutory exceptions is met. *Reeves, supra* at 494. Of relevance here, separate property may be redistributed if the other spouse "contributed to the acquisition, improvement, or accumulation of the property." MCL 552.401. Aside from the statutory exceptions, a separate asset may also become a joint asset due to commingling, which causes the asset to lose "any characteristic of being separate property." *Pickering, supra* at 12-13.

Although plaintiff purchased the Block Road home before the parties were married, the home served as the parties' marital home for approximately the first four years of their marriage, and defendant testified that she contributed to extensive renovations of the home before it was sold. Although plaintiff contrarily testified that little remodeling was performed on the Block Road home after the parties were married, "[t]his Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses." *Draggoo, supra* at 429. Accordingly, the trial court was permitted to treat the equity earned in the Block Road home as a marital asset subject to division. MCL 552.401.¹

Plaintiff also challenges the trial court's failure to find that several vehicles were his separate property, identifying a 1984 Trans Am, a 1984 Peterbilt semi-truck, and two Great Dane trailers. The testimony at trial reflected that plaintiff purchased all of these vehicles prior to the parties' marriage. The trial court included these vehicles in the marital estate. Assuming that the statutory exceptions regarding separate property were not implicated and that the vehicles were not maintained with marital funds, reversal is still not required. The trial court grouped the above-referenced vehicles with several other items of personal property, including a boat, Peterbilt tractor, Ford F-150, snowmobile, and various additional trailers, and concluded that they must have a total value of at least \$10,000, although the values were uncertain for the most part. These items of personal property were awarded to the person who currently held possession and control, which was essentially plaintiff, and plaintiff was ordered to pay defendant \$5,000 as an offset. Because there was a lack of evidence establishing values concerning several of these items, and that evidence which was presented was questionable, and because plaintiff never testified whether the premarital purchases were actually paid off before the marriage, we are not prepared to remand the case on the basis that some of the property was not marital. This is especially so when the dollar amount placed on the cumulative property by the court was necessarily speculative due to plaintiff's faulty proofs and when it is possible that the \$5,000 awarded to defendant was fair and equitable even if some of the property constituted separate property.² In other words, on this record, we cannot conclude that permitting the trial

¹ In any event, it is unclear from the facts presented below what portion, if any, of the \$32,000 in appreciation on the Block Road home occurred before the parties' marriage or how much equity plaintiff had in the home before the parties' marriage. Plaintiff's failure to present the necessary proofs below to support his argument dooms this claim on appeal.

² On this basis, we also reject plaintiff's argument concerning the Polaris snowmobile.

court's ruling to stand is inconsistent with substantial justice; therefore, reversal is unwarranted. MCR 2.613(A) (“[A]n error in a ruling or order . . . is not ground for . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.”).

Plaintiff next asserts that the trial court erred by failing to address defendant's sale of a Mercury Sable and failing to attribute the value of that car to her. However, while the parties submitted different estimates of the value of the Sable to the court, defendant's testimony that she owed more for the car than it was worth when she traded it in was unrebutted. Because the parties had no equity in the car, we see no error in the court's failure to specifically divide its “value” between the parties.

Plaintiff also asserts that the trial court erred by awarding defendant 60 percent of its approximation of the value of the parties' investment assets on the basis of plaintiff's attempt to conceal investment assets. In cases in which a party has attempted to conceal assets, “there is no automatic rule of forfeiture and the court's role is still to achieve equity, not to punish the noncompliant party.” *Koy v Koy*, 274 Mich App 653, 659; 735 NW2d 665 (2007). Yet, where a party has demonstrated a pattern of conduct during the proceedings that is devious and deceptive, an equal division of marital assets may not be equitable. *Sands, supra* at 36.

Here, the trial court indicated its strong belief that plaintiff had been attempting to conceal investment assets from defendant and the court. The evidence supports this conclusion, where it indicates that plaintiff was shuffling funds between investment accounts, including his admission that he eventually placed large sums in an investment account owned by his father. There was also a suggestion in the record that plaintiff had hidden money behind the fireplace in the marital home, and plaintiff failed to provide defendant or the court with up to date investment account statements. In fact, plaintiff's trial attorney admitted that plaintiff did not have “clean hands” but simply attempted to justify his behavior. Contrary to plaintiff's argument, the court did not “ignore” defendant's alleged use of forged checks from the Hausbeck Trucking, Inc. account in determining the equitable division of the investment assets. Rather, the court acknowledged

that Mr. Hausbeck was from time to time called upon to cover bad checks written by his wife. However, even though the check records have been in Mr. Hausbeck's control, he failed to submit documentation as to the amounts he was called upon to pay on her behalf. He also failed to rebut her claim that at least some of the checks were written by her for legitimate household expenses due to his miserly refusal to provide adequately for the family's needs.

Plaintiff has thus failed to establish any clear error with the court's finding in this regard.

Plaintiff correctly points out that during closing arguments the court indicated its belief that it could “act essentially punitively” when a party attempts to conceal assets. Although this assertion was incorrect, it does not require reversal of the court's ultimate disposition. In *Sands*, this Court concluded that “[o]nce a spouse intentionally has misled the court or the opposing spouse regarding the existence of an asset, that spouse should be estopped from receiving any part of that property.” *Sands v Sands*, 192 Mich App 698, 704; 482 NW2d 203 (1992), *aff'd* on other grounds 442 Mich 30 (1993). Our Supreme Court, however, rejected such an automatic

forfeiture rule and the notion of punishment, but concluded that so long as the ultimate disposition was equitable reversal is not required. *Sands, supra*, 442 Mich at 36-37. In light of plaintiff's apparent attempt to conceal assets, we are not left with a definite and firm conviction that the court's division of the investment assets was inequitable. Accordingly, we affirm the trial court's disposition of the investment assets.

Plaintiff next contends that the trial court erred in awarding spousal support, asserting that the court failed to properly impute income to defendant. A trial court's decision with regard to spousal support must be affirmed on appeal "unless the appellate court is firmly convinced that it was inequitable." *Olson v Olson*, 256 Mich App 619, 630; 671 NW2d 64 (2003). However, the decision to impute income is reviewed for an abuse of discretion. See *Rohloff v Rohloff*, 161 Mich App 766, 776; 411 NW2d 484 (1987).

An order for spousal support is authorized by MCL 552.23. "Spousal support is to be based on what is just and reasonable under the circumstances of the case." *Korth v Korth*, 256 Mich App 286, 289; 662 NW2d 111 (2003).

In deciding whether to award spousal support, factors the trial court should consider include "the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case." The trial court should make specific factual findings regarding the factors that are relevant to the particular case. The primary purpose of spousal support "is to balance the incomes and needs of the parties in a way that will not impoverish either party." [*Id.* (citations omitted).]

Plaintiff asserts that pursuant to *Healy v Healy*, 175 Mich App 187, 191-192; 437 NW2d 355 (1989),³ the trial court failed to properly impute income to defendant where she voluntarily reduced her income when she lost her position with Consumer's Energy. However, defendant's separation from Consumer's Energy was not the sort of willful reduction in income the *Healy* Court was attempting to prevent. Rather, the evidence indicated that defendant's separation from Consumer's Energy was precipitated by health issues, which resulted in her absenteeism.⁴ Accordingly, *Healy* is not appropriately applied in this case.

In any event, in its opinion following trial, the court, in fact, imputed to defendant income equivalent to that earned from a full-time minimum wage job, although she was only working part-time as of trial. Relying on the Washtenaw County Alimony Guideline, the court awarded defendant "rehabilitative support in the amount of \$872 per month retroactive to September 25,

³ In *Healy, supra* at 192, this Court held that a trial court may base alimony on a party's potential to earn income where that party has purposefully reduced their income.

⁴ A state unemployment claim determination cited by plaintiff does indicate that defendant was fired for absenteeism, but it then further provides that "both you [defendant] and your employer [Consumers Energy] state that your absences were due to illness and the circumstances were outside of your control. . . . It is found that you were not fired for a deliberate disregard of your employer's interest."

2000, the date of Mrs. Hausbeck's prayer for said relief." The award was set to continue until September 25, 2004. In its opinion, the court considered the relevant factors in determining whether an award of spousal support was appropriate. Notably, defendant testified that she was actively seeking better employment but had been unable to obtain the same. Our review of the record does not lead us to the conclusion that the trial court abused its discretion by imputing the income it did to defendant. Rather, the award of temporary spousal support appears reasonable under the circumstances of this case, *Korth, supra* at 289, and plaintiff has failed to convince us that the award was inequitable. Accordingly, the award of spousal support is affirmed.

Plaintiff next asserts that the trial court erred by ordering him to pay \$10,000 in attorney fees on defendant's behalf. A trial court's decision to award attorney fees in a divorce case is reviewed for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 437-438; 664 NW2d 231 (2003). "A trial court may order one party to a divorce to pay the other party's reasonable attorney fees and litigation costs if the record supports a finding that financial assistance is necessary because the other party is unable to bear the expense of the action." *Olson, supra* at 635. A party should not have to invade assets they rely on for support to prosecute or defend a divorce action. *Id.*

Here, defendant requested an award of attorney fees at the beginning of the trial. At trial, lists detailing the time her attorney spent on the case and the payments made by defendant were offered into evidence. Her attorney billed at the rate of \$125 an hour and had fees totaling \$18,161 at the time of trial, of which \$8,691 had been paid. At trial, defendant's attorney indicated that defendant was "absolutely dead flat broke." Defendant also offered into evidence a list detailing her estimated regular expenses, which exceeded her income at the time. Defendant argued that the attorney fees were high due to plaintiff's failure to be straightforward with regard to the parties' investments. The trial court found that "[b]ecause of Mr. Hausbeck's conduct, Mrs. Hausbeck incurred extensive attorney fees way beyond her ability to pay and far more than should have been necessary." Accordingly, the court awarded her \$10,000 in attorney fees to be paid on her behalf by plaintiff.

Attorney fees may be awarded "where the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation." *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). As noted above, evidence was presented that plaintiff was attempting to conceal assets and that defendant incurred high legal fees because the concealment required defendant's attorney to put in extra time ascertaining the extent and whereabouts of the party's assets. Accordingly, the court's finding that plaintiff's unreasonable conduct caused defendant to incur otherwise unnecessary legal fees for which defendant lacked the ability to pay was not error.

Plaintiff appears to argue that it was error for the court to decide the attorney fee issue at trial instead of holding a separate evidentiary hearing. However, it is not error to award attorney fees without a separate evidentiary hearing where a sufficient record to review the issue has been created and the court has fully explained its award of attorney fees. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). Here, defendant proffered evidence detailing how her attorney fees were incurred and the extent to which she had been able to pay the fees, and the court explained that its decision to award attorney fees was based both on plaintiff's conduct and on defendant's inability to pay. Because these findings are adequately supported by the record, an award of attorney fees was appropriate. Therefore, the trial court

cannot be said to have abused its discretion by ordering plaintiff to pay that portion of defendant's attorney fees which she had been unable to pay.

Finally, plaintiff asserts that the trial court erred by imputing insufficient income to defendant when determining plaintiff's child support obligation. Following a de novo hearing with regard to child support, the court increased its imputation of defendant's gross annual income from the \$10,712 used to determine her entitlement to short-term alimony to \$15,660, the amount used by the hearing referee to determine the appropriate allocation of child support. The trial court found after its own review of the entire record that the referee's findings of fact and recommendation with regard to child support were supported by law and fact. The court noted, "Mr. Hausbeck has failed to persuade the court that Mrs. Hausbeck is capable of earning anything more than the amount imputed to her by the referee. Even now that Mrs. Hausbeck has commenced employment, her earnings are still less than had been imputed to her" by the referee.

Plaintiff again complains that the level of income imputed to defendant is insufficient because at one time defendant earned a higher wage when working for Consumers Energy. We have already rejected plaintiff's arguments regarding defendant's past employment with Consumers Energy, and we also note that the record indicates attempts by plaintiff to undermine and sabotage defendant's employment with other employers.

Plaintiff further argues that the court erred in reaching its decision because it did not set out specific findings with regard to defendant's ability to earn the imputed income. See *Ghidotti v Barber*, 459 Mich 189, 198-199; 586 NW2d 883 (1998). The factors to be considered include the party's employment history, education and skills, available work opportunities, diligence in trying to find work, the party's personal history, assets, health and physical abilities, and availability for work. *Id.* In the opinion regarding child support, the trial court referenced defendant's employment history and her lack of capacity and ability under the circumstances to earn more than the amount actually imputed, and other factors had already been addressed in the divorce bench trial in regard to spousal support. Therefore, reversal and remand for further findings is unwarranted.

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald