

STATE OF MICHIGAN
COURT OF APPEALS

DARLENE MAE OJA,

Plaintiff-Appellee,

v

DENNIS JOHN OJA,

Defendant-Appellant.

UNPUBLISHED

April 29, 1997

No. 174250

Wayne Circuit

LC No. 93-308319 DO

Before: Young, P.J., and Taylor and R.C. Livo,* JJ.

PER CURIAM.

Defendant appeals as of right from the judgment of divorce ending his five year marriage to plaintiff. We remand for additional findings of fact.

Plaintiff and defendant met in October, 1988, and began living together soon thereafter. They married on March 11, 1989, one week after defendant was granted a divorce from his previous wife. It was the second marriage for both defendant, age forty-one, and plaintiff, age fifty. Defendant's \$60,000 per year income was substantially more than plaintiff's income from part-time employment during the marriage. At the time of the divorce, plaintiff earned \$6.00 per hour while working approximately twenty-two hours per week.

The parties agree that problems developed early in their marriage. Plaintiff testified that she attempted to resolve these marital problems but soured on the marriage after one year and became depressed. Defendant maintained that plaintiff was jealous and confrontational throughout the marriage, and theorized that plaintiff seduced him in order to obtain a marriage proposal because she was about to lose her main income, government child support payments and payments on a land contract. After two attempts at marriage counseling failed, plaintiff and defendant began occupying separate bedrooms in the spring of 1992 and ceased talking to one another. Plaintiff filed for divorce one year later. Unable to reach an amicable dissolution of the marriage, the parties proceeded to trial on issues of fault,

* Circuit judge, sitting on the Court of Appeals by assignment.

alimony, attorney fees, and the distribution of all the marital property, including the marital home and two rental properties purchased during the marriage.

Defendant initially contends that he was denied due process because he was not afforded the opportunity to present evidence and proffer arguments before an impartial decisionmaker. Because defendant did not move for disqualification of the trial judge on the ground that he was biased or prejudiced, this issue is not preserved for review. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 23; 436 NW2d 70 (1989). We find that there are no exigent circumstances in this case which necessitate that we review defendant's unpreserved constitutional question. *Michigan Up & Out of Poverty Now Coalition v Michigan*, 210 Mich App 162, 167-168; 533 NW2d 339 (1995).

Defendant next challenges several of the trial court's factual findings which underlay its ultimate property distribution. We will uphold a judge's findings of fact in a divorce action unless they are clearly erroneous. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). We have reviewed the record and determine that the trial court did not clearly err in: 1) finding that the parties were equally at fault for the breakdown of the marriage; 2) determining the value of airline vouchers; and 3) including defendant's "moving allowance" in the marital estate. However, we agree with defendant that the trial court clearly erred in establishing the value of the two rental properties.

When presented with conflicting evidence, the trial judge is generally given great latitude in determining the value of an asset. *Rickel v Rickel*, 177 Mich App 647, 650; 442 NW2d 735 (1989); *Pelton v Pelton*, 167 Mich App 22, 25-26; 421 NW2d 560 (1988). Yet here, the trial judge was only provided with evidence by defendant which, through comparable properties, established that the rental properties were worth at most \$40,200 and \$51,000. Because there is no factual basis for the trial judge's findings that the properties were worth \$55,000 and \$58,000, we are left with a definite and firm conviction that a mistake has been made and find that the trial judge clearly erred in valuing the rental properties. *Mitchell v Mitchell*, 198 Mich App 393, 396; 499 NW2d 386 (1993).

While this issue alone requires that we remand this matter for further proceedings, we address defendant's other assertion of error involving the property division in order to guide the trial court in fashioning an equitable distribution of the marital estate. Defendant contends that the property division was inequitable and that the parties should have been returned to their respective premarital economic status. We are only partially persuaded by defendant's argument. A trial court's division of the marital estate need not be equal, but it must be equitable. *Sparks, supra* at 159.

Among the equitable factors to be considered are the source of the property; the parties' contributions toward its acquisition, as well as the general marital estate; the duration of the marriage; the needs and circumstances of the parties; their ages, health, life status, and earning abilities; the cause of the divorce, as well as all past relations and conduct between the parties; and general principles of equity. [*Hanaway v Hanaway*, 208 Mich App 278, 293; 527 NW2d 792 (1995).]

In the case at bar, it appears that the trial court neglected to consider the source of the property and the parties' contributions toward both its acquisition and the general marital estate. The trial court awarded defendant less than 40% of the marital assets, however, plaintiff contributed most of the premarital assets and the vast majority of the family income used to acquire property and maintain the parties' standard of living during the marriage. These factors, particularly when not offset by other equitable factors favoring plaintiff, favor defendant receiving a greater share of the marital property.

In recognizing the relative contributions of income by the parties identified in this record, we do not intend to signify approval of the "restitution" approach to property division urged by defendant. Such an approach "partakes of a suit for recession rather than the dissolution of a marriage." *Bone v Bone*, 148 Mich App 834, 837; 385 NW2d 706 (1986). On remand, the trial court must weigh *all* of the equitable factors relevant to the distribution decision, including those specifically noted above, and fashion a property division that is more equitable under the circumstances of this case. *Sparks, supra* at 158-160.

With respect to defendant's remaining issues, we conclude that the trial court did not abuse its discretion in awarding alimony to plaintiff in the form of defendant paying her health insurance for three years. *Maake v Maake*, 200 Mich App 184, 187; 503 NW2d 664 (1993). In light of plaintiff's part-time employment that does not provide her with benefits and her general inability to afford insurance coverage, the alimony award was equitable. *Ackerman v Ackerman*, 163 Mich App 796, 803-804; 414 NW2d 919 (1987). Similarly, the trial court did not abuse its discretion in awarding plaintiff \$3,000 in attorney fees because she earns a modest wage and need not be required to invade her few income producing assets to pay her litigation expenses. *Hanaway, supra* at 298; *Maake, supra* at 189.

We remand for further findings with respect to the value of the rental properties and distribution of the marital estate upon consideration of all the equitable factors. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Robert P. Young, Jr.

/s/ Clifford W. Taylor

/s/ Robert C. Livo