

STATE OF MICHIGAN
COURT OF APPEALS

DIANE BERTHA JALOSKY,

Plaintiff-Appellant,

v

THOMAS RICHARD JALOSKY,

Defendant-Appellee.

UNPUBLISHED

June 13, 1997

No. 189943

St. Clair Circuit Court

LC No. 93-002508-DM

Before: Corrigan, C.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals by right the judgment of divorce, challenging the court's refusal to award attorney fees to her and the court's distribution of the marital estate. We affirm.

Plaintiff first claims that the trial court abused its discretion in refusing to award attorney fees because defendant's unreasonable conduct during the litigation substantially increased her attorney fees. On appeal, plaintiff ignores the trial court's finding that both parties had caused the escalated attorney fees. This factual finding was not clearly erroneous. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). While plaintiff incurred attorney fees because defendant failed to comply with a temporary support order, defendant incurred attorney fees because plaintiff refused to sign a joint tax return and otherwise to cooperate in resolving certain matters. A party to a divorce action may be made to bear the cost of unnecessary legal fees caused by his or her misconduct. See *Ianitelli v Ianitelli*, 199 Mich App 641, 645; 502 NW2d 691 (1993); *Mulligan v Mulligan*, 197 Mich App 665, 670-671; 496 NW2d 394 (1992); and *Wilson v Wilson*, 179 Mich App 519, 524-526; 446 NW2d 496 (1989). The rationale for this rule supports the trial court's refusal to award plaintiff attorney fees because she also was responsible for the increased attorney fees. Consequently, the trial court did not abuse its discretion in refusing to award plaintiff attorney fees. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995).

Plaintiff also argues that the trial court abused its discretion in denying her attorney fees because she financially was unable to pay them, while defendant could afford to pay them, and because she should not be required to invade the principal of her property award to pay her attorney fees. An

award of attorney fees may be proper if the parties' incomes significantly are disparate. Moreover, a party should not be required to invade the principal amount of a property settlement to pay attorney fees when the property settlement is intended to provide support. *Hanaway, supra*, 208 Mich App at 299; *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993); MCL 552.13; MSA 25.93; MCR 3.206(C)(2). Although the parties' potential incomes significantly are disparate, so is the distribution of the marital debt. Defendant bears most of the debt burden. Consequently, the trial court did not abuse its discretion in denying plaintiff's request for attorney fees, despite the significant disparity in the parties' incomes. See *Heike v Heike*, 198 Mich App 289, 294; 497 NW2d 220 (1993).

Plaintiff next contends that the trial court erred by failing to make explicit factual findings on the record regarding the factors relevant to the distribution of property, which plaintiff maintains were mandated in *Sparks, supra*. Although the trial court did not mention explicitly each factor discussed in *Sparks*, the court did not err. In *Sparks*, our Supreme Court did not establish a rigid framework for analysis, but instead only required that relevant factors be addressed on the record. *Sparks, supra*, 440 Mich at 159. Plaintiff's argument, which suggests per se error because the court did not go through a checklist of findings on each of the *Sparks* factors, is without merit. A review of the record demonstrates that the trial court made relevant factual findings on the record.

Plaintiff next argues that the trial court erred in awarding her only \$5,000 of the proceeds of defendant's 401K pension fund. We disagree. The court found that the fund was worth \$19,500 at the beginning of the divorce proceedings, that defendant had used \$10,000 of this fund during the pendency of divorce proceedings to reduce the marital debt, and that an additional ten percent early withdrawal penalty was outstanding. Thus, approximately \$9,500 remained for property division. The Court awarded \$5,000 to plaintiff and the remainder, including the obligation to pay the outstanding early withdrawal penalty, to defendant. Plaintiff argues that the trial court should have awarded her \$10,000, or one-half the initial value, and that by only awarding her \$5,000, the court erroneously forced her to pay a portion of the marital debt that should have been entirely the responsibility of defendant. To the extent that plaintiff now argues she should pay nothing toward the marital debt, we note that plaintiff explicitly asked the court to divide the marital debt. A party may not ask the court to take action and then claim on appeal that the action was error. *Munson Medical Center v ACIA*, 218 Mich App 375, 388; 554 NW2d 49 (1996). Moreover, to the extent the award of \$5,000 imposes responsibility for \$5,000 of marital debt on plaintiff, this amount represents only twenty percent of the total approximate marital debt of \$25,000. Further, plaintiff's approximate net earning potential of \$6,240 is 13.7 percent of defendant's approximate net earning potential of \$45,500. We are not left with a firm conviction that this distribution of the debt is inequitable. Thus, the trial court did not abuse its discretion in distributing the 401K proceeds. *Sparks, supra*, 440 Mich at 152 (dispositional ruling should be affirmed unless appellate court is left with firm conviction that the division was inequitable).

Plaintiff next asserts that the trial court erred in requiring her to pay certain uninsured medical bills incurred when the parties' daughter was injured in a minor automobile accident. We disagree. Plaintiff argued below that she should not be required to pay these bills for two reasons: (1) she reasonably believed that the bills would be covered by the parties' health insurance; and (2) even if the hospital bill was not covered, it was reasonable because it was an emergency situation. The trial court

found that the situation was not an emergency that warranted treatment by an uncovered medical provider. Plaintiff raises several allegations of error in regard to this ruling. First, plaintiff claims that defendant should be responsible for the bill because he admitted that he did not inform plaintiff of the coverage limitations. Plaintiff mischaracterizes this testimony. Defendant actually stated that he did not inform plaintiff of a change in coverage that occurred *after* the bills at issue were incurred. Second, plaintiff alleges that even if the hospital visit was not covered, she subjectively believed that it would be. However, plaintiff fails to cite any authority demonstrating that the trial court's ruling was erroneous in the face of this factual allegation. Plaintiff also relies, as she does repeatedly, on the fact that she did not work during the majority of the marriage to argue that this distribution of debt was inequitable. This fact is irrelevant to the question whether plaintiff should pay for a specific hospital bill she incurred by failing to stay within the parameters of the parties' health care insurance.

Plaintiff next claims that the trial court erred in ordering that a horse owned by the parties be sold and the proceeds distributed between the parties because the cost of its maintenance exceeded its value. Plaintiff asserts that the trial court demonstrated a "punitive intent" and penalized plaintiff for being a "stay at home" wife. We disagree. The court merely noted that the cost to maintain the horse for one year exceeded its value. The record does not support plaintiff's allegation that the trial court sought to punish her. To the contrary, the court accomplished the most equitable solution with regard to this asset, i.e., the court evenly split its value.

Next, the court did not err by offsetting the dispositional award by the full amount of the net equity in the cottage that was awarded to plaintiff. During trial, the parties disputed the value of this property. They subsequently agreed that the party who was awarded possession of the cottage would have his or her share of the marital estate reduced by \$2,450. Consequently, plaintiff's argument on appeal is without merit. *Munson Medical Center, supra*, 218 Mich App at 388.

Plaintiff also argues that defendant concealed the value of the accouterments of his upholstery business. Plaintiff asserts that defendant therefore should forfeit those assets in her favor. Plaintiff's allegation that defendant concealed these assets, however, is inaccurate. Defendant testified that he had worked in his upholstery business when he was laid off from his regular employment and testified about the value of the equipment and the business. The record does not reflect that this defendant intentionally concealed these assets. Thus, plaintiff's argument is without merit. We decline to address whether the trial court erred in awarding defendant the business and its assets because plaintiff did not raise the issue at trial. *Burgess v Clark*, 215 Mich App 542, 548; 547 NW2d 59 (1996). We note, however, that the court awarded plaintiff the value of her sales business.

Finally, because plaintiff stipulated to using the 1994 appraisal of the marital home to ascertain its value, her claim of error is without merit.

Affirmed.

/s/ Maura D. Corrigan

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

