

STATE OF MICHIGAN
COURT OF APPEALS

WAYNE CHARLES ARENT

Plaintiff-Appellant,

v

DARLENE JOYCE ARENT,

Defendant-Appellee.

UNPUBLISHED

March 3, 1998

No. 200180

Berrien Circuit Court

LC No. 96-000087-DO

Before: Neff, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce entered on October 8, 1996. We affirm.

Plaintiff first challenges the trial court's disposition of the parties' property. In reviewing a challenge to a dispositional ruling, we first review the trial court's findings of fact, *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992), which will not be reversed unless clearly erroneous, *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). A finding is clearly erroneous if, after a review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Id.* If the trial court's findings of fact are upheld, we then review whether the dispositional ruling was fair and equitable in light of those facts. The dispositional ruling, however, is discretionary and will be affirmed unless we are left with the firm conviction that the division was inequitable. *Sparks, supra*, p 152.

The goal in distributing marital assets in a divorce is to reach an equitable division of property in light of all the circumstances. *Ackerman v Ackerman*, 163 Mich App 796, 807; 414 NW2d 919 (1987). An equitable division need not be an equal division, but any significant departure from congruence should be supported by a clear exposition of the court's ruling. *Knowles v Knowles*, 185 Mich App 497, 501; 562 NW2d 777 (1990). To reach an equitable division, the trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health and needs, fault or past misconduct, and any other equitable consideration. *Sparks, supra*, pp 158-160. The significance of each of these

factors will vary from case to case; however, where the circumstances dictate otherwise, each factor need not be given equal weight. *Id.*, p 159.

Here, the trial court rendered a disposition that resulted in a forty-eight percent/fifty-two percent split in favor of defendant. We find that this is an equitable division of property. The trial court found that, based upon the evidence, plaintiff's health was better than that of defendant, and that defendant could have serious health problems in the future that could undermine her future earning ability. Because these findings are supported by the evidence, the trial court's disposition of the parties' property was fair and equitable.

Plaintiff also contends that the trial court erred in valuing his and defendant's savings as of different dates (plaintiff's savings as of the date he filed for divorce and defendant's savings as of the date of trial). The determination of the proper time for valuation of an asset is in the trial court's discretion. *Burkey v Burkey (On Remand)*, 189 Mich App 72, 76-77; 471 NW2d 631 (1991). Our review of the record reveals that the parties presented a great deal of conflicting and contradictory figures representing the respective values of their accounts. Shortly after the first day of trial, defendant stipulated to having a combined checking and savings account balance of \$15,381. However, on the second day of trial, defendant testified to having account balances totaling \$14,059. Plaintiff, on the other hand, concedes that the testimony arguably supports that he had savings of \$6,000 at the time he filed for divorce. At trial, however, plaintiff specifically testified that he had savings totaling less than \$3,200. Given the variety of figures tendered to the trial court, we cannot say that the trial court abused its discretion in valuing the parties' accounts as of the times that it did. See, e.g., *Thompson v Thompson*, 189 Mich App 197, 199-200; 472 NW2d 51 (1991).

Plaintiff also contests the trial court's decision to order that he refund to defendant \$26,000, which represents a portion of an inheritance received by defendant from her mother and solicited by plaintiff in contemplation of the divorce. Further, plaintiff would have this Court deduct the inheritance money from defendant's property award before calculating the respective percentages of marital property assigned to each party, thereby widening the gap between the value of the parties' property awards in favor of plaintiff.

A trial court's decision to include an inheritance in the valuation of the marital estate is left to the discretion of the trial court and depends upon the particular circumstances of a given case. *Demman v Demman*, 195 Mich App 109, 112; 489 NW2d 161 (1992). We find that the trial court properly determined to treat defendant's inheritance as separate property, thereby excluding it from the marital estate. Plaintiff, however, having already spent the \$26,000 in inheritance proceeds that he solicited from defendant, was ordered to return the money to defendant. Given the trial court's finding that plaintiff received these funds in contemplation of the divorce, a finding that we will not disturb because it is supported by the evidence, the trial court properly exercised its discretion in ordering plaintiff to repay the inheritance money.

Plaintiff next argues that the trial court erred in ordering that he pay \$10,000 alimony in gross to defendant. The decision to award alimony, a dispositional ruling, is reviewed to determine whether it

was fair and equitable in light of the facts of the case. *Beason, supra*, p 798; *Sparks, supra*, p 152. Among the factors that a trial court should consider are: (1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the abilities of the parties to work; (4) the source and amount of property awarded to the parties; (5) the parties' ages; (6) the abilities of the parties to pay alimony; (7) the present situation of the parties; (8) the needs of the parties; (9) the parties' health; (10) the prior standard of living of the parties and whether either is responsible for the support of others; (11) contributions of the parties to the joint estate; (12) a party's fault in causing the divorce; (13) the effect of cohabitation on a party's financial status; and (14) general principles of equity. *Ianitelli v Ianitelli*, 199 Mich App 641, 644; 502 NW2d 691 (1993); *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 696 (1991).

The trial court found that plaintiff bore most of the fault for the breakdown of the marriage, and that defendant's poor health could result in her having a diminished ability to earn future income. The trial court found that neither party held a notable advantage with respect to the other factors enumerated above. Because a party's health and fault in causing the divorce are legitimate factors that a trial court can consider in deciding whether to award alimony, we find that the trial court's alimony award was fair and equitable.

Plaintiff next argues that the trial court erred in ordering that he pay \$2,500 in attorney fees to defendant. We will not reverse a trial court's award of attorney fees in a divorce action absent an abuse of discretion. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993).

A trial court may order an award of attorney fees in a divorce case only as necessary to enable a party to prosecute or defend a suit. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995); MCL 552.13(1); MSA 25.93(1); MCR 3.206(C). Plaintiff claims that the record is devoid of evidence showing that defendant suffers from such necessity. We disagree. At trial, defendant testified that if the trial court required her to pay the cost of her attorney, she would have to sell an asset or borrow the money. A party may not be required to invade her assets to satisfy attorney fees when she is relying on the same assets for support. *Maake, supra*, p 189. Here, because the evidence supports that defendant would have had to invade her assets in order to pay her attorney, it cannot be said that the trial court's decision to award her attorney fees constituted an abuse of its discretion.

Plaintiff argues, however, that the trial court erred in not making specific findings respecting defendant's need for attorney fees. Although a review of the record reveals that the trial court did not specifically find that defendant would be unable to defend the action without an award of attorney fees, we believe that such a finding is implicit in the court's other rulings and clearly supported by the evidence. See *Stackhouse v Stackhouse*, 193 Mich App 437, 446-447; 484 NW2d 723 (1992); *Kurz v Kurz*, 178 Mich App 284, 297-298; 443 NW2d 782 (1989).

Plaintiff last argues that the trial court erred in failing to grant his motion to amend the judgment pursuant to MCR 2.611(A)(1), where he presented the trial court with evidence that the parties jointly expended the first \$5,000 of the \$26,000 inheritance on day-to-day bills. A trial court should grant a

motion for a new trial or to amend a judgment based upon newly discovered evidence only if the newly discovered evidence “could not with reasonable diligence have been discovered and produced at trial,” MCR 2.611(A)(1)(f). *Stallworth v Hazel*, 167 Mich App 345, 353; 421 NW2d 685 (1988).

Plaintiff contends that on the second day of trial defendant “surprised everyone” by presenting further testimony respecting the amount of the inheritance money that she had advanced to plaintiff. Plaintiff asserts that he had no advance warning that defendant would present such testimony, and therefore, he had not prepared to respond to the testimony. In his motion to amend the judgment, plaintiff argued that, following the trial, he further researched the value of the inheritance and discovered evidence showing that the parties had actually jointly expended \$5,000 of the alleged \$26,000 advanced to plaintiff. The trial court, however, denied the motion stating that plaintiff had a full and fair opportunity to bring this evidence to the court’s attention at trial and failed to do. We agree with the trial court.

Whether a party was surprised by testimony is not determinative of whether amendment of a judgment or a new trial is warranted. A moving party must bring forward “material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial.” MCR 2.611(A)(1)(f). At the motion hearing, plaintiff merely contended that following the trial he further investigated the matter and discovered that \$5,000 of the inheritance was put in the parties’ joint checking account, from which the parties paid common household bills. Because plaintiff, with reasonable diligence, could have discovered and produced such evidence at trial, the trial court properly denied the motion to amend the judgment.

Affirmed.

/s/ Janet T. Neff

/s/ Kathleen Jansen

/s/ Jane E. Markey