

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DORA RUTH PROFFER,

Plaintiff-Appellant,

v

JEFFREY CREG PROFFER,

Defendant-Appellee.

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UNPUBLISHED

March 9, 1999

No. 203594

Genesee Circuit Court

LC No. 94-175952 DO

Before: Cavanagh, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

In this divorce case, plaintiff appeals as of right the trial court's distribution of the marital assets in the judgment of divorce, and the court's denial of plaintiff's motion for relief from judgment. We affirm the findings made by the trial court with regard to the value of the marital assets; however, we remand so that the trial court can distribute certain marital assets which it did not include in the judgment. We also affirm the trial court's denial of plaintiff's motion for relief from judgment.

Plaintiff filed for divorce in January 1994 after nearly four years of marriage. The trial began on November 27, 1996. On the second day of trial, December 9, 1996, the proceedings ended with plaintiff's counsel questioning plaintiff with regard to the disposition of certain antique toys and furniture she had purchased with premarital assets. Due to scheduling conflicts, the trial did not resume until January 27, 1997. The court began the trial that day by stating that its notes indicated that when proceedings ended on December 9, 1996, plaintiff was being questioned by her attorney regarding the couple's purchase of the marital home. Plaintiff's counsel agreed, and proceeded to elicit testimony from plaintiff concerning that purchase. Nothing further was said about the antique toys or furniture.

After the court had entered its opinion with regard to the disposition of the marital assets, plaintiff filed a motion for reconsideration, arguing that the court had committed palpable error in failing to take into consideration the fact that the antique toys and furniture purchased by plaintiff with premarital assets had been sold by the couple at an auction and that she was entitled to the proceeds of that sale. The court found that no testimony with regard to an auction had been presented at trial and denied plaintiff's motion.

Plaintiff first argues on appeal that the trial court abused its discretion by denying her motion for relief from judgment pursuant to MCR 2.612(C). *Henritz v General Electric Co*, 182 Mich App 1, 7; 451 NW2d 558 (1990). MCR 2.612(C)(1)(a) provides that a court may relieve a party from a final judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect. Plaintiff contends that her attorney's failure to elicit testimony with regard to the alleged auction of \$28,000 worth of antiques and toys purchased by plaintiff with premarital assets was excusable, as the trial court had interrupted him just as he had begun to elicit that testimony, and when the trial resumed six weeks later, the trial court had mistakenly stated that the trial had left off at a discussion concerning the purchase of the marital home. Because of the lengthy break in proceedings, plaintiff's counsel did not realize the error. Further, plaintiff argues, because defendant does not deny that such a sale occurred, the property distribution must be adjusted to prevent substantial injustice to plaintiff.

This Court has explained that GCR 1963, 528.3(1), the predecessor of MCR 2.612(1)(a), was not designed to remedy errors on the part of trial counsel, but, rather, "[i]ts application should be limited to extraordinary circumstances where the failure to set aside the court's final determination will result in substantial injustice." *Lark v The Detroit Edison Co*, 99 Mich App 280, 282-283; 297 NW2d 653 (1980). Although the rule anticipates that mistakes and oversights will occur, whether or not a mistake or oversight is excusable is a matter for the trial court to determine. *Muntean v City of Detroit*, 143 Mich App 500, 510; 372 NW2d 348 (1985). In making that determination, the trial court must consider and balance the sometimes competing goals of rendering justice more perfectly and achieving finality in litigation. *Id.* at 511.

The record indicates that the court here weighed the need for finality in this case, which had been ongoing for almost as long as the parties had been married, with the fact that plaintiff had had ample opportunity to offer proofs on the subject of the disposition of the antiques at trial. While lengthy breaks in civil proceedings are to be avoided, they do not constitute extraordinary circumstances. Thus, we do not believe that plaintiff's failure to elicit testimony concerning the disposition of those items is the sort of "excusable neglect" that MCR 2.612(C)(1)(a) is designed to remedy. We find no abuse of discretion in the decision of the trial court not to grant plaintiff's motion for relief from judgment.

Plaintiff also argues that the trial court abused its discretion by failing to conduct an evidentiary hearing, pursuant to MCR 2.119(E)(2), on her motion for relief from judgment. *Williams v Williams*, 214 Mich App 391, 399; 542 NW2d 892 (1995). Plaintiff contends that because her motion was based on facts not appearing in the record, the court was obligated to conduct an evidentiary hearing so that the relevant facts could be made part of the record. Where a party seeks relief from judgment based on the ground that a fraud was committed on the court, an evidentiary hearing is required. *Id.* at 394. However, given that there were no allegations of fraud, concealment, or misrepresentation in this case, and given the fact that plaintiff had every opportunity to make a record during the trial, we find that the trial court did not abuse its discretion in failing to conduct an evidentiary hearing on plaintiff's motion and ruling based on the record made at trial.

Plaintiff next argues that the trial court clearly erred in finding that defendant's job as a sales representative for a company that sold wicker baskets had no value as a marital asset. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). A finding is clearly erroneous if a review

of the entire record leaves this Court with the definite and firm conviction that a mistake has been made. *Id.* When a trial court's findings are based on the credibility of witnesses, they are given special deference. *Id.* Plaintiff contends that because defendant was a self-employed independent contractor, under *Kowalesky v Kowalesky*, 148 Mich App 151, 154-56; 384 NW2d 112 (1986) and *McNamara v McNamara*, 178 Mich App 382, 388, 392; 443 NW2d 511 (1989), mod on other grounds, 436 Mich 862 (1990), his "business" should be valued as a going concern and distributed as a marital asset. We disagree. In both cases cited by plaintiff, this Court addressed a trial court's valuation of a professional practice that had market value as an entity that could be sold. The trial court in this case heard the testimony of both parties' experts, one of whom testified that defendant's business could not be sold, and the other of whom testified that, if the business could not be sold, it lacked market value. The court also heard the testimony of defendant concerning the specific terms of his employment. The trial court concluded that whether defendant was an independent contractor, a sole proprietor, or an employee, his "business" had no value, other than to provide him with earnings as long as the company whose products he sold continued to allow him to sell for them. Given the testimony presented to the trial court, we do not find that the court clearly erred in finding that defendant's job had no value as a marital asset.

Plaintiff next argues that the trial court's failure to find defendant at fault for the breakdown of the marriage was clearly erroneous. *Draggoo, supra* at 429. Plaintiff alleged that the marriage ended as a result of three assaults on her by defendant. Defendant denied two of those assaults, and with regard to the third, testified that he only slapped plaintiff after she slapped him first. No other testimony concerning the alleged assaults was presented. Given the contradictory testimony presented, we find that the trial court did not clearly err in concluding that there was insufficient evidence upon which to find that defendant was at fault for the breakdown of the marriage.

Finally, plaintiff argues that the trial court's distribution of marital assets must be reversed because it was neither fair nor equitable. The trial court's dispositional ruling with regard to marital assets is discretionary and will be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Draggoo, supra* at 429-30. The goal in apportioning marital assets in a divorce proceeding is to reach an equitable property division in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). The division need not be mathematically equal, but any significant departure from congruence must be clearly accounted for by the court. *Id.* at 115. The factors to be considered when dividing a marital estate include (1) the duration of the marriage, (2) the contribution of each party to the marital estate, (3) each party's station in life, (4) each party's earning ability, (5) each party's age, health, and needs, (6) fault or past misconduct, and (7) any other equitable circumstance. *Sparks v Sparks*, 440 Mich 141, 158-160; 485 NW2d 893 (1992); *Byington, supra* at 115. The factors need not be given equal weight where the circumstances indicate otherwise. *Id.*

We find that the trial court's failure to distribute two of the assets which it identified and valued as part of the marital estate resulted in an inequitable distribution. The trial court valued the marital estate at \$226,048, but only distributed assets in the amount of \$204,484. Plaintiff's award totaled \$96,609, while defendant's award totaled \$107,875. The remaining assets, the increase in equity in a

property (4205 Fenton Road), valued by the court at \$8,180, and the mortgage reduction on a second property (4137 Fenton Road), valued at \$13,384, remained in the possession of defendant.<sup>1</sup> As it stands, the court's failure to distribute the remaining two assets left defendant in sole possession of the former property, including the increase in equity realized during the marriage, and gave no credit to plaintiff as a result of the sale of the latter property, the mortgage on which plaintiff helped reduce and from which defendant realized proceeds of about \$37,500. Thus, it appears that plaintiff actually received only 43% of the marital estate that the court valued at \$226,048 and defendant received 57%. Because the court did not indicate fault on the part of either party or offer any other explanation for a disproportionate division of assets, we are left with the firm conviction that a mistake was made and the resulting division of assets was inequitable. Thus, we remand to the trial court to equitably distribute these assets in light of its other decisions.

Affirmed in part, and remanded for amendment of the judgment of divorce consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Stephen J. Markman

/s/ Michael R. Smolenski

<sup>1</sup> In his brief on appeal, defendant shows these amounts as being offset by his contribution of \$24,000 toward the land contract on the cottage. However, nowhere in its opinion did the trial court indicate that it intended defendant's contribution to offset these assets. Rather, it appears that the court found plaintiff's \$20,000 contribution of the down payment on the acreage adjacent to the South Jennings Road property and defendant's contribution of \$24,000 toward paying for the cottage to offset each other (Opinion of the Court at 3).