STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH BLASZAK,

Plaintiff-Appellee,

v

THOMAS LEO BLASZAK,

Defendant-Appellant.

UNPUBLISHED
July 16, 1999

No. 205926
Wayne Circuit Court
LC No. 93-323898 DM

Before: Markman, P.J., and Jansen and J.B. Sullivan,* JJ.

PER CURIAM.

Previously, defendant appealed as of right from a judgment of divorce. This Court reversed the trial court's property division and award of attorney fees and remanded for further proceedings. On remand, the trial court issued an opinion and order modifying the judgment of divorce pursuant to this Court's instructions. Defendant now appeals that order as of right, and we affirm.

On remand, the trial court found that, during the course of the marriage, which lasted just a little over three years before plaintiff filed for divorce, defendant's premarital estate of approximately $147,000 had appreciated to a total of approximately $249,000, spread among some thirty different bank and stock accounts, for a net increase of approximately $102,000. The court further found that, of that $102,000 appreciation, approximately $33,600 represented separate property, presumably belonging to the children of defendant's first marriage who, during defendant's marriage to plaintiff, received Social Security benefits on account of their mother's death. The court specifically found that the remaining $68,353.25 was marital property.

The trial court then awarded 55% of the $68,353.25, or $37,594.29, to plaintiff, along with 55% of the remaining marital estate which consisted of equity in the marital home, vehicles and $5,500 in joint accounts. Plaintiff's original award of $8,000 in attorney fees was reduced to $3,000. Defendant, on the other hand, was awarded the full amount of his premarital estate of approximately $147,000, the $33,600 from Social Security, and 45% of the $68,353.25, or $30,758.96, for a total of

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

approximately $211,400 in cash or securities, as well as 45% of the home equity, vehicles and $5,500 in joint accounts.

On appeal, defendant argues that the trial court erred in ruling that $68,353.25, the appreciation on defendant's bank and stock accounts exclusive of the $33,600 in Social Security money, was marital property. We disagree. We review the distribution of property by first reviewing the trial court's findings of fact for clear error, and then reviewing the dispositive ruling for fairness and equity in light of the facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992); *Byington v Byington*, 224 Mich App 103, 109; 568 NW2d 141 (1997). As to the latter, we affirm unless we are left with the firm conviction that the distribution was inequitable. *Sparks, supra* ,152; *Byington, supra,* 109.

The distribution of property in a divorce is controlled by MCL 552.1 *et seq.*; MSA 25.81 *et seq*. *Reeves v Reeves*, 226 Mich App 490, 493; 575 NW2d 1 (1997). When granting a divorce, the trial court may divide all property that came to either party by reason of the marriage, MCL 552.19; MSA 25.99, *Reeves, supra,* 493, but must strive for an equitable division of any increase in net worth that may have occurred between the beginning and the end of the marriage. *Byington, supra*, 113. The trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets. *Reeves, supra,* 493-494. Property earned during the existence of a marriage is presumed to be marital property. *Byington, supra,* 112. Generally each party takes away from the marriage that party's own separate estate with no invasion by the other party. *Reeves, supra,* 494. However, a spouse's separate assets can be distributed as part of the marital estate when one of two statutorily created exceptions is met. MCL 552.23; MSA 25.103; MCL 552.401; MSA 25.136; *Reeves, supra,* 494. One exception permits invasion of separate assets when the other spouse contributed to the acquisition, improvement, or accumulation of the property. MCL 552.401; MSA 25.136; *Reeves, supra*, 494-495.

In this case, the trial court did not clearly err in finding that $68,353.25, which constituted the $102,000 appreciation of defendant's assets during the marriage less the Social Security money, constituted marital property. Indeed, the entire $102,000 was accumulated during the marriage, is presumed to be marital property, and is therefore all subject to division at the time of divorce. *Byington, supra.* We note that plaintiff has made no claim to the $33,600 in Social Security money, even though it was not spent on defendant's children as presumably intended, or on anything at all, but rather defendant put it into one or more of his numerous accounts. Moreover, defendant testified at trial that he could not distinguish between his and his daughters' money, that he did not know what he was going to do with the money when his daughters left home, and that some could be used for his retirement.

As to the remaining $68,353.25, it clearly was accumulated not only during the marriage but also as a result of the contributions of both plaintiff and defendant. *Reeves, supra.* In the school year of 1990-1991, plaintiff earned $27,600, which represented 60% of her regular salary of $46,000 as a school speech pathologist. She took maternity leave in 1991-1992 to care for the child of the parties who was born June 15, 1991, but returned in 1992-93, earning approximately $52,000, and her 1993-94 salary was approximately $57,000. Defendant's gross income for 1990 was $27,357, and for the next three years he averaged approximately $47,000.

Defendant's involvement with the thirty bank and stock accounts in this case was not passive. *Reeves, supra,* 497. This was not money that had been left alone in a separate bank account for the duration of the marriage, but rather accounts which defendant actively managed, using the parties' joint checking account as a "clearing account" for transactions he made with the money from all of his accounts. Defendant frequently transferred money from account to account and transferred money from CD's to the parties' joint account back to CD's or mutual funds. Plaintiff contributed to the appreciation of these assets by contributing her salary to the payment of family expenses which allowed defendant to leave the money in his accounts untouched. *Reeves, supra,* 497. Plaintiff also contributed by caring for the family, including defendant's daughters from his first marriage, which allowed defendant to actively manage his thirty accounts. *Hanaway v Hanaway*, 208 Mich App 278, 294; 527 NW2d 792 (1995). The trial court did not err in concluding that the appreciation on these accounts was marital property.

Next, defendant argues that the trial court's property distribution was inequitable. We again disagree. As noted, in distributing assets in a divorce, the court must strive for an equitable distribution of any increase in net worth that may have occurred during the marriage. *Byington, supra.* The division need not be equal, but it must be equitable. *Sparks, supra,* 159. The court should consider the following factors whenever they are relevant to the circumstances of a particular case:

> (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. [*Sparks, supra,* 440 Mich 159-160.]

There may be additional factors that are relevant to a particular case and the determination of those relevant factors vary depending on the facts and circumstances of each case. *Sparks, supra*, 160.

In this case, the trial court based its division of assets on the parties' needs, station in life, earning capacity, fault and past misconduct. The court found that defendant provided for the family during the year immediately following the birth of their child, but that plaintiff contributed to the family's support in the form of household services and child care during that time. The court found that the parties' contribution to the marital estate was relatively equal, but also considered defendant's failure to disclose the existence of many accounts and plaintiff's needs as custodial parent of Megan. The court found that, by earning a portion of her salary in 1990-91 and resuming work in September 1992, plaintiff contributed to the appreciation of the numerous accounts by relieving defendant of some of his child care and support responsibilities, thereby allowing the funds to stay in the accounts and appreciate in value.

This was a relatively brief marriage, the parties are approximately the same age, both have masters degrees and earn salaries in the $50,000 range. In this Court's prior opinion in this case, the panel did not overturn the trial court's finding that defendant concealed assets. Plaintiff filed for divorce when she found envelopes containing money after defendant told her the money had not arrived. As a result of defendant's failure to disclose assets, plaintiff was required to file motions to compel documents

and for contempt. Defendant testified at his deposition that plaintiff contributed $60,000 toward the house, but agreed that his trial brief used a figure of $40,000. Plaintiff testified that, prior to the marriage, defendant told her he had saved $100,000, but at trial the figure was represented as $147,000. Plaintiff testified that defendant has the capability of earning $54,000 or $55,000 at Ford, but chose to work less so that it would appear to the Friend of the Court that he earned less. She also testified that money was very tight during the marriage, evidence which contrasts sharply with defendant's statement in his Reply Brief that he "provided documentation of the expenses for their family of six, showing that they lived up to their income (about $70,000 a year during the marriage)." During trial, the court permitted questioning regarding some checks which defendant produced for the first time. However, the court noted that "the information was withheld from counsel for the Plaintiff." While the Supreme Court, in *Sands v Sands*, 442 Mich 30, 36; 497 NW2d 493 (1993), instructs that a party's attempt to conceal assets is only one factor to consider, based on the evidence in this case, we are not left with the firm conviction that the trial court's division of property was inequitable. *Sparks, supra*, 152.

Finally, defendant argues that the trial court erred in granting plaintiff an award of attorney fees. We again disagree. We review the trial court's decision to award or deny attorney fees in a divorce action for an abuse of discretion. *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997).

In the opinion following defendant's first appeal, this Court stated:

> Thomas next argues that the trial court erred in awarding attorney fees to Deborah. We agree. A trial court's award of attorney fees in a divorce proceeding will not be reversed on appeal absent an abuse of discretion. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). In this case, it appears from the record that Deborah had sufficient income to pay her own attorney fees, and that Thomas' conduct was not so unreasonable as to justify an award to Deborah of $8,000.

Contrary to defendant's claim, the prior opinion does not completely foreclose an award of attorney fees on remand, but merely rejected an award in the amount of $8,000. Moreover, we are not impressed with defendant's attempt in his brief to mischaracterize that opinion by stating, "this Court reversed the award of attorney fees . . .on the ground that [plaintiff] was not entitled to an award of fees based on need . . .[and i]t is inappropriate now to base the attorney fee award on a different ground." This Court clearly reviewed *both* plaintiff's need and defendant's unreasonable conduct.

In awarding plaintiff $3,000 in attorney fees on remand, the trial court correctly cited this Court's opinion in *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992), for the proposition that an award of attorney fees is authorized 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 litigation. Indeed, this Court has long so held. See, e.g., *Thames v Thames*, 191 Mich App 299, 310; 477 NW2d 496 (1991); *Rogner v Rogner*, 179 Mich App 326, 330; 445 NW2d 232 (1989); *Ashbrenner v Ashbrenner*, 156 Mich 373, 377-378; 401 NW2d 373 (1986).

The trial court then ruled the following with respect to the issue of attorney fees:

> As stated above, it is undisputed that Mr. Blaszak failed to timely provide complete answers to interrogatories. While he claims that he was only responding in regard to what he considered marital property, his actions in doing so precluded the court's consideration of what constituted marital property. Further, Ms. Blaszak was forced to bring, and this Court was called upon to hear, her motion to compel. While the Court of Appeals determined that an award of $8,000.00 in attorney fees in conjunction with a 60% property award was inequitable, on remand this Court finds an award to Ms. Blaszak of $3,000.00 in attorney fees to be equitable.

There is no question that plaintiff was forced to incur additional attorney fees as a result of defendant's unreasonable conduct during the litigation. The trial court's ruling to that effect and its reasons for doing so are fully supported by the record and cannot be said to be an abuse of discretion. *Hawkins, supra*.

Affirmed.

/s/ Stephen J. Markman
/s/ Kathleen Jansen
/s/ Joseph B. Sullivan