STATE OF MICHIGAN

COURT OF APPEALS

DIANE ELISABETH GRASSI, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED June 9, 2000
v	No. 210742 Oakland Circuit Court
RANDY E. GRASSI, Defendant-Appellee/Cross-Appellant.	LC No. 95-504740-DM

DIANE ELISABETH GRASSI, Plaintiff-Appellant,	
v	No. 212533 Oakland Circuit Court
RANDY E. GRASSI, Defendant-Appellee.	LC No. 95-504740-DM

Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

In Docket No. 210742, plaintiff Diane Grassi appeals as of right and defendant Randy Grassi cross-appeals from a judgment of divorce. In Docket No. 212533, plaintiff appeals by leave granted from a post-judgment order regarding child support. The appeals have been consolidated for this Court's consideration. We affirm in part, reverse in part, and remand for further proceedings.

I

Plaintiff claims that the trial court erred in determining that defendant earned only $50,000 per year in income. According to plaintiff, the evidence at trial showed that defendant's income should have been imputed at a much higher amount. Defendant, on the other hand, claims that the evidence did not

support the court's finding that he earned $50,000 per year. He claims on cross-appeal that his income was "no more than $25,000 per year." We have conducted an exhaustive review of the evidence presented below and conclude that the trial court did not clearly err in finding that defendant's income was $50,000 per year. *Beason v Beason*, 435 Mich 791, 804-805; 460 NW2d 207 (1990). The totality of evidence relating to defendant's business earnings, his failure to record and report all earnings, the parties' lifestyle and annual expenses, the parties' credit card expenditures and debt, and plaintiff's mother's loans to the parties was subject to multiple interpretations. Although this evidence could have been construed as showing that defendant's income was significantly more than or less than $50,000, it could also be construed as showing an income of $50,000 per year. Accordingly, we are not left with a definite and firm conviction that a mistake was made. *Id.*

II

The parties agree that the trial court, when determining child support, deviated from the child support guidelines range. Because the trial court did not articulate on the record its reasons for deviating from the guidelines, we remand this matter for the trial court to either adjust the support order on the basis of the child support guidelines, or to state its reasons for deviating from the guidelines in accordance with MCL 552.16(2); MSA 25.96(2); *Eddie v Eddie*, 201 Mich App 509, 513; 506 NW2d 591 (1993). On remand, should plaintiff again request that the trial court provide security for defendant's child support obligation, we direct the trial court to rule on this request and state its reasons for granting or denying the request on the record.

Additionally, while we acknowledge that a trial court has discretion to retroactively cancel child support arrearages, *Ozdaglar v Ozdaglar*, 126 Mich App 468, 473; 337 NW2d 361 (1983), the trial court here provided no explanation for its decision to cancel defendant's child support obligation between September 21, 1995 and February 5, 1997, the date of the temporary child support order. Therefore, we are unable to determine whether the trial court properly exercised its discretion with regard to this issue. On remand, we direct the trial court to reconsider this ruling and state its reasons for its ruling on the record. The trial court should also indicate why it ordered that the child support amount set forth in the May 28, 1998 order, $273.00 per week, would not be retroactive to the temporary order of February 5, 1997.

III

Plaintiff also argues that the trial court abused its discretion in failing to award her alimony. We agree.

The factors that a trial court should consider when determining whether to award alimony include: (1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the ability of the parties to work; (4) the source and amount of property awarded to the parties; (5) the age of the parties; (6) the ability of the parties to pay alimony; (7) the present situation of the parties; (8) the needs of the parties; (9) the health of the parties; (10) the prior standard of living of the parties and whether either is responsible for the support of others; and (11) general principles of equity. *Demman v Demman*, 195 Mich App 109, 110-111; 489 NW2d 161 (1992); *Ianitelli v Ianitelli*, 199 Mich App

641, 642-643; 502 NW2d 691 (1993). In addition, a party's fault in causing the divorce is a valid consideration in awarding alimony. *Demman, supra* at 111. However, the concept of fault cannot be given disproportionate weight. *Sparks v Sparks*, 440 Mich 141, 162-163; 485 NW2d 893 (1992). Ability to pay alimony includes the unexercised ability to earn if income is voluntarily reduced to avoid paying alimony. *Healy v Healy*, 175 Mich App 187, 191-192; 437 NW2d 355 (1989). The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. *Hanaway v Hanaway*, 208 Mich App 278, 295; 527 NW2d 792 (1995). A trial court has discretion to award alimony it considers just and reasonable. *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996). This Court will not modify an alimony award unless it is convinced that it would have reached a different result sitting in the position of the trial court. *Parrish v Parrish*, 138 Mich App 546, 553; 361 NW2d 366 (1984). Although this Court's review of the alimony award is de novo, we accept the trial court's factual findings unless they are clearly erroneous. *Id.* at 308.

We conclude that the trial court abused its discretion in failing to award plaintiff alimony. The record reveals that (1) the parties had been married for over fifteen years, (2) defendant worked full-time throughout the marriage whereas plaintiff had been a stay-at-home mother responsible for raising the parties' four children since 1987, (3) defendant had successfully operated two businesses during the marriage while plaintiff had been out of the job market since 1987, had only a high school degree, and had no technical training or skills, (4) defendant earned $50,000 a year while plaintiff was jobless and that plaintiff relied upon her mother to loan her money to support herself, (5) plaintiff, having been awarded the sole physical custody of the four children, was responsible for their care, and (6) the undisputed evidence indicated that defendant was responsible for the breakdown of the marital relationship. Additionally, defendant received a slightly greater portion of the marital estate than plaintiff. Furthermore, he was awarded as his sole and separate property Grassi Auto Sales and MGM Towing Company, as well as the inventory belonging to Grassi Auto Sales. In light of the fact that the evidence showed that plaintiff required, at a minimum, some, short-term, rehabilitative alimony and that defendant had at least some ability to pay alimony, the trial court abused its discretion in failing to award alimony to plaintiff. *Maake v Maake*, 200 Mich App 184, 187; 503 NW2d 664 (1993). We remand this matter to the trial court for a determination of the proper amount of alimony to be awarded to plaintiff. *Id.*

IV

Plaintiff further contends that the trial court erred in failing to place a value on defendant's businesses. The record here shows that Grassi Auto Sales was defunct at the time of the divorce and, therefore, presumably worthless except for left over inventory (awarded to defendant) and the lot (appraised at $25,000 and which the trial court ordered sold and the proceeds divided between the parties). However, MGM Towing Company was a viable, going concern at the time of the divorce. MGM Towing had assets, and defendant testified that the company was worth between $5,000 and $10,000. Defendant conceded at trial that MGM Towing Company was a marital asset. Without discussion or reasoning, the trial court refused to evaluate the towing company, stating only that it was awarding the company to defendant. We believe that the court should have determined the value of MGM Towing and awarded plaintiff an equitable share of the

value of the company or stated its reasons on the record for not doing so. See *Steckley v Steckley*, 185 Mich App 19, 23-24; 460 NW2d 255 (1990); *McNamara v McNamara*, 178 Mich App 382, 392-393; 443 NW2d 511 (1989), modified 436 Mich 862 (1990). Because all of the other assets were divided on an almost equal basis, there appears to be no reason to award 100% of this asset to defendant and the trial court gave no reason for doing so. Accordingly, we remand this matter to the trial court to effect an equitable division of this asset. *Id.* In all other respects, we find that the distribution of the marital estate, which was divided on an almost equal basis, was fair and equitable in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997).

V

Plaintiff alleges that the trial court should have ruled that the marital residence on Highland Road was plaintiff's separate property and, therefore, not a part of the marital estate. We disagree. A trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets. *Byington*, *supra* at 114 n 4. Generally, marital assets are subject to division between the parties but the parties' separate assets may not be invaded. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). However, a spouse's separate estate can be opened for redistribution when one of two statutorily created exceptions is met. MCL 552.23 and 552.401; MSA 25.103 and 25.136; *Reeves*, *supra* at 494. Here, it is clear from the evidence that plaintiff was not solely responsible for the down-payment on the marital residence. The majority of the down payment on the Highland Road residence came from the sale of the Porter Road house. Though plaintiff made the down payment on the Porter Road house from her own assets, there is no dispute that both parties contributed to the mortgage payments and improvements made to that house, which were made over an eight-year period. Hence, the proceeds from that house were a result of the parties' joint efforts and, therefore, are a marital asset. Additionally, although improvements made to the home may have been made possible by funds plaintiff received from her mother, defendant's contribution was just as great. Plaintiff was a stay-at-home mother and it was defendant's income, as plaintiff admits, that paid for the parties' everyday living expenses. By 1997, the property had appreciated in value to $210,000, again as a result of the joint efforts made by the parties. Clearly, the acquisition and improvement of the marital residence, as well as the appreciation in value of the residence, was a result of the parties' joint efforts. Under these circumstances, the trial court correctly concluded that the marital residence on Highland Road was a marital asset, not plaintiff's separate property.

VI

Plaintiff also claims that the trial court erred in ordering that the children's funds must remain in a separate trust account. We disagree. With regard to the money maternal grandmother, Anna Stratton, gave to the parties' children, the trial court found that

> [t]he children are entitled to the money established in their names, valued at approximately $120,000. Neither party is to have any claims at all on these monies and they are to be held in trust for the children until they reach the age of eighteen. An officer of the bank where the money is held will be responsible for the maintenance of these accounts.

Contrary to plaintiff's claim, the trial court did not order the bank officer to do anything. The court's order pertained to the parties and required them to establish trust funds for the children. The trial court simply determined that a bank officer, rather than either of the parties, would administer the funds. We find nothing inequitable with this ruling, especially in light of the fact that both parties admitted that the children's money was the children's sole and separate property and that those funds were not a part of the marital estate.

VII

With regard to the property division, defendant claims on cross-appeal that the trial court failed to distribute both of the parties' life insurance polices. Defendant is mistaken. Our review of the record clearly shows that the trial court disposed of both polices. Plaintiff's policy was awarded to her and defendant's policy, or the $3,500 cash surrender value thereof, was also awarded to plaintiff.

VIII

Additionally, plaintiff avers that the trial court abused its discretion in failing to award her all or a portion of her attorney fees. We agree. An award of attorney fees in a divorce action is authorized when it is necessary to enable the party to carry on or defend the suit. MCL 3.206(C)(2); *Maake, supra* at 189. See also MCL 552.13(1); MSA 25.93(1). This Court will not reverse the trial court's decision to award or deny attorney fees in a divorce action absent an abuse of discretion. *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997); *Jansen v Jansen*, 205 Mich App 169, 173; 517 NW2d 275 (1994).

Defendant mistakenly claims that plaintiff made no showing that she needed attorney fees. The evidence indicated that plaintiff was an unemployed, stay-at-home mother. She relied upon loans from her mother to pay her expenses, including her attorney fees which at the time of the divorce trial exceeded $47,000. Defendant, on the other hand, earned more than $50,000 a year and had the ability to earn more. He admitted, for instance, that he could re-open his used car lot at a different location. However, even assuming that defendant earned only $50,000 per year, there is still a great disparity in the parties' ability to earn a living. Moreover, because the trial court awarded defendant the used car inventory remaining on the Grassi Auto Sales lot, he had additional assets and income from which to assist plaintiff, at least partially, with her attorney fees.

In sum, the record demonstrates that plaintiff did not have the funds necessary to enable her to carry on the litigation. *Ozdaglar, supra* at 472-473. She should not be required to invade the assets she was awarded in the divorce, such as her IRA, given that she will need those assets to support herself. *Id.* Under these circumstances, we believe that the trial court abused its discretion in refusing to award plaintiff attorney fees. This matter is remanded to the trial court for a determination of a reasonable attorney fee. *Id.*

IX

Defendant claims on cross-appeal that the trial court erred in awarding plaintiff sole legal custody of the children. Defendant does not dispute that custody of the children was not an issue at trial. In fact, defendant admits that he agreed to allow plaintiff to have physical custody of the children. He argues, however, that even though he stipulated to plaintiff receiving physical custody of the children, he did not agree to the award of sole legal custody to plaintiff.

At the request of a parent, joint custody must be considered by the court. The court must determine whether joint custody is in a child's best interests through a consideration of the factors set forth in MCL 722.26a; MSA 25.312(6a). *Wellman v Wellman,* 203 Mich App 277, 279; 512 NW2d 68 (1994). The court must state on the record its reasons for granting or denying a request for joint custody. MCL 722.26a; MSA 25.312(6a).

It is clear from the record that, during the divorce hearing, defendant did in fact consent to plaintiff receiving both sole physical and sole legal custody of the children. Prior to the conclusion of the divorce trial, the trial court entered an order awarding plaintiff sole legal and physical custody of the parties' children. Defendant did not object to the form of the order, the language contained in the order, or the entry of the order. In fact, in defendant's proposed findings of fact submitted at the end of the divorce trial, defendant admitted that the issue of custody had been "[r]esolved by *stipulated* orders." Clearly, defendant stipulated to plaintiff receiving both physical and legal custody of the children. Therefore, he cannot now be heard to complain that the trial court erred in awarding sole legal custody of the children to plaintiff. A party cannot request a certain action in the trial court and then argue on appeal that the action was error. *People v McCray,* 210 Mich App 9, 14; 533 NW2d 359 (1995).

To the extent that defendant claims that the trial court erred in failing to rule on the best interest factors, we note that because custody was not at issue in this case, neither party presented evidence at trial relating to the best interest factors. Moreover, where the parties stipulate to the award of custody and the trial court accepts the parties' agreement regarding custody, the trial court is not required to expressly articulate on the record its findings regarding each of the statutory best interest factors. *Koron v Melendy,* 207 Mich App 188, 191-193; 523 NW2d 870 (1994). See also *Dick v Dick,* 210 Mich App 576, 584-585; 534 NW2d 185 (1995).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ Henry William Saad