

STATE OF MICHIGAN
COURT OF APPEALS

TIMOTHY R. MACKIN,

Plaintiff-Appellant/Cross-Appellee,

v

KATHRYN MACKIN,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

November 7, 2000

No. 213206

Oakland Circuit Court

LC No. 96-525602-DM

Before: Gribbs, P.J., and Neff and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce that was entered following a bench trial. Defendant filed a cross-appeal. We affirm.

The parties were married in September 1991. In May 1994, plaintiff told defendant that he did not think he loved her anymore and moved out of the marital home. Shortly thereafter, plaintiff became involved with another woman. In October 1994, plaintiff confessed his infidelity and told defendant that he had made a mistake and wanted to be part of her life. Plaintiff moved back into the marital home, but the parties separated again in June 1996 and the divorce action was filed. The trial court determined that plaintiff was at fault for the breakdown of the marriage and awarded defendant a larger share of the marital property and attorney fees, but denied defendant's request for spousal support.

Plaintiff argues that the trial court's finding of fault was clearly erroneous in light of the testimony. We disagree. A trial court's findings of fact in a divorce case are reviewed for clear error. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); *Wellman v Wellman*, 203 Mich App 277, 278; 512 NW2d 68 (1994). A finding is clearly erroneous if the appellate court, after considering all the evidence, is left with a definite and firm conviction that a mistake has been committed. *Id.* Deference is given to those findings of fact that are based on the credibility of the witnesses. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997).

While it is true that both parties testified to difficulties early in the marriage, the trial court's findings are supported by the testimony of both parties and reflect the trial court's assessment of the credibility of the witnesses. Defendant testified that she thought the breakdown of the marriage started

when plaintiff left the marital home. Plaintiff moved out of the marital home in May 1994, after telling defendant that he did not think he loved her anymore. Defendant had reason to believe that plaintiff was involved in a relationship with another woman and she brought up the subject in April or May 1994.

In October 1994, plaintiff confessed his infidelity. He told defendant that he had made a mistake and wanted to be part of defendant's life. Defendant was willing to give the marriage another try, and plaintiff moved back into the marital home. In 1995, defendant found a possession belonging to the woman in the pocket of plaintiff's pants, discovered that plaintiff had written checks to the apartment complex where the woman lived, and found a freshly folded love note from the woman in plaintiff's wallet. When defendant confronted plaintiff about the checks, he confessed that he had fallen in love with the woman. In light of this evidence, this Court does not have a definite and firm conviction that the trial court committed a mistake. The trial court's finding, that plaintiff's conduct led to the breakdown of the marriage, is not clearly erroneous.

Plaintiff also contends that the concept of "condonation" was relevant in determining his fault and was applicable to the property division. Plaintiff claims that, because defendant condoned plaintiff's conduct by forgiving him and resuming a marital relationship, the element of fault should have been a less significant factor in the division of the marital property. Assuming that condonation is applicable, plaintiff cannot establish defendant's condonation of his conduct. Condonation, implying forgiveness for offensive conduct, is conditional on the nonrepetition of such conduct. *Durham v Durham*, 331 Mich 668, 671; 50 NW 327 (1951), quoting *Tackaberry v Tackaberry*, 101 Mich 102; 59 NW 400 (1894). Defendant testified that plaintiff told her he did not want a relationship with the woman and that he was no longer seeing the woman. However, after plaintiff moved back into the marital home, he confessed that he was paying the woman's rent and phone bill and that he had fallen in love with the woman. Furthermore, plaintiff testified that he told defendant that he was not seeing the woman any longer, but he saw the woman as late as the beginning of 1995. This testimony shows that plaintiff's relationship with the woman continued on some level and, therefore, condonation would not apply.

Plaintiff argues that, even if he was at fault for the breakdown of the marriage, the trial court's division of the property placed too much emphasis on the factor of fault. We disagree. This Court reviews a trial court's dispositional ruling to determine if it was fair and equitable in light of the facts presented. *Quade v Quade*, 238 Mich App 222, 224; 604 NW2d 778 (1999), citing *Sands, supra* at 34. The dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Quade, supra* at 224, citing *Sands, supra* at 34.

The objective of a property settlement is to reach a fair and equitable division in light of all the circumstances. *Demman v Demman*, 195 Mich App 109, 114; 489 NW2d 161 (1992). The lower court's division of the marital property does not have to be equal, but it must be equitable. *Sparks v Sparks*, 440 Mich 141, 159; 485 NW2d 893 (1992). When dividing marital property, the court must consider the following factors whenever they are relevant:

(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. [*Dart v Dart*, 460 Mich 573, 583; 597 NW2d 82 (1999), quoting *Sparks, supra* at 159-160.]

The significance of these factors vary according to the facts, and the weight given to each factor need not be equal. *Welling v Welling*, 233 Mich App 708, 710; 592 NW2d 822 (1999).

We conclude that the property distribution in this case was fair and equitable. The evidence established that defendant made significant contributions to the marital estate. Defendant worked full-time during 1993 and the majority of 1994. After the birth of the parties' child, defendant worked part-time, in accordance with the parties' agreement. The evidence also showed that the life status of the parties improved significantly. As the business improved and plaintiff's earnings increased, the parties purchased two houses, and \$80,000 to \$100,000 was placed in a Merrill Lynch account.

The evidence also established the disparity in the needs and circumstances of the parties. At the time of trial, plaintiff earned \$120,000 and defendant earned \$565 every two weeks. Defendant testified that her earnings were spent on daycare and groceries. Defendant's testimony regarding her checks and charges on the Merrill Lynch account indicated that her normal living expenses were significantly higher than her income. Defendant was concerned that it would be detrimental to the child if defendant worked full-time because there was only one parent in the home. Moreover, plaintiff's dependability for help with child care and his potential mental state were called into question through the evidence regarding his convictions for drinking and driving and his telephone call to defendant, during which he stated that he had a loaded gun pointed at his head. Although the trial court's distribution of the marital property was unequal, it was fair and equitable in light of all of the circumstances.

Plaintiff also argues that the trial court's finding, that defendant's expenditures from the Merrill Lynch account were applied to normal living expenses, was clearly erroneous. We disagree. Plaintiff could not specify which expenditures violated the injunction and defendant testified that all of the expenditures were in accordance with the injunction because they were for normal living expenses. The trial court's finding, that defendant's expenditures were for normal living expenses, was supported by the record and is not clearly erroneous.

Plaintiff argues that the trial court's finding regarding the value of the three homes awarded to defendant was clearly erroneous. We disagree. The trial court's order adopted the values of the homes, as stipulated by the parties. Plaintiff's counsel argued in his closing argument that the stipulated values were one year old and the value of the properties had increased. However, while marital assets are typically valued as of the date of the trial or the entry of judgment, the trial court has the discretion to use a different date. *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997). After consideration of all the evidence, we are not convinced that the trial court erred.

Plaintiff also challenges the trial court's finding regarding the value of plaintiff's 401(k) because it does not reflect an after-tax value. The trial court's failure to consider tax consequences in the

distribution of marital assets is not a per se abuse of discretion. *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993). Where there is no indication that an event resulting in taxation is contemplated, the trial court's decision not to adjust the asset's value is not an abuse of discretion. *Hanaway v Hanaway*, 208 Mich App 278, 300-301; 527 NW2d 792 (1995). In this case, the 401(k) was awarded to plaintiff. As a result, the account was not affected and tax penalties were not assessed. The trial court did not abuse its discretion by failing to discount the value of the 401(k).

Plaintiff also challenges the trial court's failure to assign a value to the furnishings in the marital home. We conclude that the trial court's failure to consider the value of the furnishings did not result in an inequitable division of the marital assets. Plaintiff thought that the furnishings in the marital home were worth approximately \$10,000, and that the furnishings in the Middlebelt home were worth \$3,000 to \$4,000. Defendant, however, testified that the Middlebelt home was well-furnished and specified some of the items in the house. In light of the record, the trial court's failure to place a specific value on the furnishings within the two homes does not make the property division inequitable.

Plaintiff argues that, when the actual values of the 401(k), plaintiff's home, and the furnishings are considered, the trial court's distribution of the assets was inequitable. Whether the division of marital property is equitable is based on the facts of the case, not a comparison of percentages. See *McDougal v McDougal*, 451 Mich 80, 88-91; 545 NW2d 357 (1996). See also *Burkey v Burkey (On Rehearing)*, 189 Mich App 72; 471 NW2d 631 (1991). We have rejected plaintiff's determination of the "actual" value of the assets. Further, the trial court applied the *Sparks* factors and concluded that a disproportionate distribution of the marital assets was appropriate. The property distribution was fair and equitable in light of the facts, regardless of plaintiff's claims of actual value.

Plaintiff also argues that the trial court clearly erred when it awarded defendant an interest in a post-marriage increase in the value of a marital asset. We disagree. When determining property rights, the court may apportion all property that has come to either party by reason of the marriage. *Byington*, *supra* at 110, quoting MCL 552.19; MSA 25.99. Once the trial court has determined that an asset is marital property, the asset must be valued. *Id.* at 114. While the trial court has discretion in determining the date of valuation, *id.*, the valuation of an asset cannot be dependent upon events occurring after the divorce. *Burkey*, *supra* at 76.

While the order does grant defendant an interest in increases in the value of the business realized after the marriage, the increases are attributable to events that occurred during the marriage. The testimony established that the business was doing well at the time of trial and future prospects were promising. For the fiscal year ending August 31, 1997, the business experienced gross sales in excess of \$2,000,000. Michael Quarton, plaintiff's business partner, testified that, at the time of trial, the company was selling a new Ameritech product that he anticipated would positively affect business operations. Quarton expected that revenues would increase for the fiscal year ending August 31, 1998. The trial court's order does not value the business on the basis of events occurring after the divorce, but rather, acknowledges defendant's contribution to the increase in the value of the business, which would not be realized until the business was sold.

Plaintiff's final argument is that the trial court erred in awarding defendant attorney fees. We disagree. A trial court's award of attorney fees is reviewed for an abuse of discretion. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). An abuse of discretion exists when an unprejudiced person would conclude that there was no justification or excuse for the trial court's ruling, in light of the facts presented. *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 167; 561 NW2d 445 (1997).

Defendant testified to the amount of the legal fees and expert witness fees incurred while defending the divorce. With the exception of the attorney's retainer fee of \$750, defendant had not paid on either of the fees because she did not have the money. Additionally, the evidence established that plaintiff had the ability to pay defendant's attorney fees. Plaintiff's income was significantly greater than defendant's income. In light of the facts presented at trial, an unprejudiced person would find that the trial court's award of attorney fees was justified. The trial court properly determined that defendant should not be required to use the assets awarded in the divorce action to pay the cost of defending the action and did not abuse its discretion. See *Hanaway*, *supra* at 298.

Defendant argues on cross-appeal that the trial court's valuation of the business was clearly erroneous because the trial court failed to consider other evidence of the value of the business. We disagree. A trial court has great latitude in determining the value of stock in closely held corporations, and where, as here, the trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

Defendant also argues on cross-appeal that the trial court's finding, that plaintiff's transfer of his closely held corporation shares did not violate the injunction, was contrary to the evidence and clearly erroneous. We disagree. The evidence showed that the transfer of stock was in the normal course of business and not in violation of the injunction. Plaintiff testified that he and Quarton entered into the business relationship in the end of 1993. According to plaintiff, the business had always been operated as though plaintiff and Quarton were equal partners, and the intention was that plaintiff and Quarton would each own fifty percent of the company's stock, after a certain period of time. This testimony was supported by Quarton, who testified that, in November 1993, he and plaintiff had an agreement that Quarton would eventually own fifty percent of the company's stock. Quarton wrote a letter, dated April 15, 1996, that referenced this agreement. The agreement was formalized when the bylaws were amended in January 1997. In light of this evidence, it cannot be said that a mistake was committed. The trial court correctly concluded that the agreement to transfer the stock predated the injunction and did not violate the injunction.

Defendant argues further that the trial court clearly erred in finding that plaintiff's interest in the corporation was not substantially affected by this transfer. We disagree. Plaintiff's expert testified that his valuation of the business was a controlling interest value that was applicable, regardless of whether plaintiff owned fifty percent or fifty-one percent of the business. Therefore, the trial court's finding, that plaintiff's interest in the corporation was not substantially affected by the transfer of stock, is supported by the record and is not clearly erroneous.

Defendant's final argument on cross-appeal is that the trial court clearly erred in denying spousal support because spousal support was reasonable and necessary under the facts of the case. Defendant maintains that the trial court's refusal to award spousal support was inequitable. We disagree. The trial court may award alimony as it considers just and reasonable. *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996). The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. *Id.*

Factors to be considered 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 the others, (11) contributions of the parties to the joint estate, and (12) general principles of equity. [*Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991).]

We conclude that the trial court's denial of spousal support was not inequitable in light of the facts presented. Defendant was awarded a significant portion of the marital property that will reasonably provide sufficient means of support for defendant and the child. Defendant received two pieces of rental property that generated yearly profits and had significant equities, the Merrill Lynch account, and one-half of plaintiff's interest in the business. Plaintiff was ordered to pay defendant in equal monthly installments over a period of thirty-six months for her share of the business. It cannot be said that the denial of spousal support was inequitable, given the allocation of marital assets.

Affirmed.

/s/ Roman S. Gribbs

/s/ Janet T. Neff

/s/ Peter D. O'Connell