STATE OF MICHIGAN

COURT OF APPEALS

BOBBY L. ROUSE,

Plaintiff-Appellee,

v

PHYLLIS B. CUNNINGHAM-ROUSE,

Defendant-Appellant.

UNPUBLISHED
October 19, 2001

No. 221406
Genesee Circuit Court
Family Division
LC No. 96-181876-DO

Before: K.F. Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. We affirm.

The parties were married in 1987, after executing an antenuptial agreement. The agreement required each party to sell their individual primary residences and invest jointly in a single marital residence. The title would include both of their names. The parties also agreed to waive any future claim for alimony or support and any property settlement would be as provided in the agreement. Further, the parties decided that the provisions of the agreement would be binding and effective in a divorce action, regardless of the reason for the divorce and irrespective of fault.

In 1996, plaintiff commenced the divorce. Following a bench trial in 1998 and several post-trial proceedings in 1999, the trial court entered a judgment of divorce nunc pro tunc to June 21, 1999. The judgment of divorce awarded plaintiff the marital residence and further required plaintiff to pay defendant a percentage of the difference between the purchase price and the appreciated value of the residence, after deductions for certain expenditures made solely by plaintiff during the marriage.

I.

First, defendant argues that there was insufficient evidence to support the trial court's findings regarding her contributions to the marital residence. In a divorce case, this Court must accept the factual findings of the trial court unless those findings are clearly erroneous. *Everett v Everett*, 195 Mich App 50, 52; 489 NW2d 111 (1992). Indeed, "[a] finding is clearly erroneous if the reviewing court, on all the evidence, is left with a definite and firm conviction that a mistake has been committed." *Id.* On review of the record here before us, we are not left with such a conviction.

Defendant objected to the trial court's determination that she had contributed little to the marital residence. At the June 21, 1999 post-trial hearing, the trial court orally addressed this issue. The court found that defendant contributed to various home improvements and paid one mortgage payment. After a careful review of the record, we are not persuaded that the trial court clearly erred by finding that defendant's contributions were minimal at best. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997).

Defendant argues further that the trial court erroneously disregarded three years of her input. We do not agree. A review of the record reveals that the trial court's reference to 1991 as the date on which the parties purchased the marital home, was merely a misstatement, inasmuch as the court subsequently referred to 1988, the correct date. There is absolutely no indication gleaned from a review of the record that the trial court's misstatement caused it to ignore or otherwise disregard defendant's contributions.

Defendant also disagrees with the trial court's treatment of her contributions when it apportioned the value of the marital residence between the parties. Because defendant has not adequately briefed any claim relative to how the contributions should have been treated for purposes of apportioning her value of the marital residence, we decline to address this issue. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984); *Community National Bank v Michigan Basic Property Ins Ass'n*, 159 Mich App 510, 520; 407 NW2d 31 (1987).

II

Next, defendant claims that the trial court, sitting as a court of equity, should not have enforced the antenuptial agreement on the grounds that it was unconscionable as enforced. However, during the trial, defendant's attorney informed the trial court that defendant was not challenging the enforceability of the antenuptial agreement as to assets. Further, defendant's attorney reiterated this position during the post-trial proceedings. Accordingly, we conclude that issues relative to the division of assets are not properly before us. This includes defendant's claim pertaining to the marital residence which underlies defendant's request for relief on appeal. A party cannot request that a trial court take a certain action and then argue on appeal that it constitutes error. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Error must be that of the trial court, and not that which an aggrieved appellant contributed to by plan or neglectful omission. *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997); *Harrigan v Ford Motor Co*, 159 Mich App 776, 786; 406 NW2d 917 (1987).[1]

Nonetheless, we note that the criterion for determining whether an antenuptial agreement is unenforceable for the reason that it is unconscionable is whether the agreement was unconscionable when executed. *Booth v Booth*, 194 Mich App 284, 287-288; 486 NW2d 116 (1992). The relevant inquiry at the time of execution is whether the facts and circumstances

[1] Although defendant's statement of this issue suggests that she is also challenging the trial court's refusal to award her alimony or spousal support, including health benefits, we deem this claim abandoned because it is not briefed by defendant. The failure to brief an allegation of error is deemed an abandonment of the issue *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

changed so as to make enforcement unfair and unreasonable. *Id.* at 289. In either case, the terms of the antenuptial agreement are construed using essentially the same principles applied to contracts in general. *In re Hepinstall's Estate*, 323 Mich 322; 327-328; 35 NW2d 276 (1948). The parties' intent is ascertained by considering the entire agreement, its general scope and purpose, and the circumstances at the time of its execution. *Id.* at 328. Parol evidence is generally admissible when construing a contract to prove or clarify an ambiguity. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). A distinct problem exists when a contract contains essential terms, but omits details of performance. In that situation, the law supplies missing details by construction. *Nichols v Seaks*, 296 Mich 154, 159; 295 NW2d 596 (1941).

In the case at bar, the trial court was called upon by both parties to enforce the antenuptial agreement as to assets, but to construe its terms with regard to the marital residence. Notwithstanding the express language of the agreement providing for enforcement irrespective of fault, the trial court nevertheless ultimately considered fault. When supplying details of performance with regard to how the value of the marital residence should be apportioned between the parties, the trial court clearly weighed the fault factor in defendant's favor.

Fault is an appropriate factor for a trial court to consider when dividing property in a divorce case, although it should not be given disproportionate consideration. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996). The court's goal is to reach an equitable division in light of all circumstances. *Welling v Welling*, 233 Mich App 708, 710; 592 NW2d 822 (1999). Treating defendant's claim of inequity as relating solely to the trial court's construction of the antenuptial agreement, rather than its enforceability, and assuming for purposes of our review that it was appropriate for the trial court to consider fault when supplying details of performance for purposes of apportioning the value of the martial residence, we are unpersuaded that the trial court's ruling was inequitable. *Draggoo, supra*; *Welling, supra*.

III

Defendant also argues that the trial court's award of attorney fees was inadequate. Although defendant's attorney requested $5,000 in attorney fees, the trial court awarded defendant only $1,500. That award was based on the trial court's determination that plaintiff was "playing games" when he attempted to exercise his Fifth Amendment rights during the proceedings.

Initially, because defendant does not address the basis for the trial court's decision to grant $1,500 in attorney fees, we could decline to consider this issue. See *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997). Notwithstanding, attorney fees are generally not recoverable unless expressly allowed by court rule, statute, or a common-law exception not applicable here. *Terra Energy, Ltd v Michigan*, 241 Mich App 393, 397; 616 NW2d 691 (2000). Although defendant contends that she was entitled to additional attorney fees pursuant to MCR 3.206,[2] the record does not support her contention. Defendant failed to set

[2] Although defendant cites MCR 3.206(A)(3) as the applicable rule, we note that attorney fees are addressed in MCR 3.206(C). *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999)

forth sufficient facts to establish that without the fees, defendant was unable to bear the expense of the action. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). Defendant failed to satisfy this burden. Accordingly, we remain unconvinced that defendant adequately demonstrated that she was entitled to a greater attorney fee award pursuant to that rule.

IV

Defendant also challenges the trial court's decision to enter the divorce judgment nunc pro tunc. Our review of the record reflects that defendant's attorney agreed with the trial court's decision to enter the judgment nunc pro tunc to June 21, 1999, rather than October 31, 1998. Accordingly, defendant may not now argue that the nunc pro tunc date constituted error. *Harrigan, supra* at 786.

V

Finally, we decline to consider defendant's thirteen additional claims of allegedly prejudicial decisions by the trial court. Merely asserting a position without accompanying legal authority is insufficient to bring an issue before this Court. *Goolbsy, supra* at 655 n 1; *In re Toler, supra* at 477. Indeed, a party cannot simply assert a position "then leave it up to the Court to discover and rationalize the basis for [her] claims . . . ." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Brian K. Zahra