

STATE OF MICHIGAN
COURT OF APPEALS

JOYCE A. ESTEPP,

Plaintiff-Counterdefendant-
Appellee,

V

WILLIAM H. ESTEPP,

Defendant-Counterplaintiff-
Appellant.

UNPUBLISHED

October 23, 2001

No. 225018

Washtenaw Circuit Court

LC No. 99-014439-DO

Before: K. F. Kelly, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant appeals of right from the judgment of divorce awarding plaintiff various marital assets, cash, and attorney fees. We affirm.

Defendant first contends that the trial court erred in ordering defendant to submit to a polygraph examination on the issue of the disappearance of the parties' Lincoln Continental. We agree. However, we hold that the error was harmless. See *Thangavelu v Dep't of Licensing & Regulation*, 149 Mich App 546, 551; 386 NW2d 584 (1986); *Stone v Earp*, 331 Mich 606, 608-610; 50 NW2d 172 (1951); MCR 2.613(A).

The record indicates that the trial court did not consider the polygraph results. The court did not admit the results into evidence because it concluded that it could resolve the issue of defendant's credibility based solely on the trial testimony. Therefore, the results did not form the basis for the court's ruling regarding the Lincoln Continental. Further, defendant's demeanor throughout the trial was uncooperative and hostile. His testimony revealed that he had been untruthful to the Friend of the Court referee regarding his gun collection. In light of defendant's testimony, and deferring to the trial court's superior ability to view the evidence and judge the credibility of witnesses, *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998), we conclude that the trial court could find that defendant was being deceptive regardless of the polygraph results.

Defendant next contends that the trial court's division of the marital property was inequitable and that the trial court erred in determining whether certain assets were part of the marital estate. We disagree.

We review the trial court's findings of fact regarding the valuations of marital assets and property division for clear error. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). A finding is clearly erroneous if, after a review of the entire record, this Court is left with the definite and firm conviction that a mistake has been made. *Id.* We give deference to a trial court's findings when they are based on the credibility of the witnesses. *Id.* If the trial court's findings of fact are upheld, this Court must decide whether the dispositive ruling was fair and equitable in light of those facts. *Id.*

In this case, it was unnecessary for the trial court to address the factors usually employed in dividing marital property because the parties had stipulated to an equal division of the marital estate.¹ *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992). Accordingly, these factors, including fault, are irrelevant. *Id.* The question becomes what property was properly considered part of the marital estate subject to division, and then whether the trial court clearly erred in its division of the marital assets.

In granting a divorce, the court may divide all property that came to either party by reason of the marriage. *Reeves v Reeves*, 226 Mich App 490, 493; 575 NW2d 1 (1997); MCL 552.19. With respect to the bank account jointly held by plaintiff and her mother, the evidence clearly supported the trial court's conclusion that the placement of plaintiff's name on the account was done only as a convenience to plaintiff's mother. Plaintiff testified that she never used the account, and there was no evidence that any marital funds were ever placed in the account. The bank account was not an asset which came to the parties by reason of the marriage, and if plaintiff had any ownership interest in the account, it was separate property and not subject to division because defendant did not contribute to the acquisition and accumulation of the account, nor did he establish need to invade the separate property considering the disparate incomes of the parties. *Reeves, supra* at 493-495.

Additionally, the evidence clearly supported the trial court's conclusion that the Ardmoor house should not be included in the marital estate. Plaintiff testified that before the separation, the only connection she actually had with the house was that her name was on the deed in order to make her mother more comfortable, and there was no evidence that any marital funds were ever used to pay for the upkeep of or the mortgage on the house. Plaintiff's mother purchased the house from the parties, and the parties used the funds to purchase the marital home; therefore, defendant enjoyed the benefit of the value of the Ardmoor house, and the equity in the marital home was divided equally. Defendant stated that throughout the marriage, plaintiff's family held

¹ "[T]he following factors are to be considered wherever they are relevant to the circumstances of the 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. *Perrin v Perrin*, 169 Mich App 18, 22; 425 NW2d 494 (1988). There may even be additional factors that are relevant to a particular case. For example, the court may choose to consider the interruption of the personal career or education of either party. The determination of relevant factors will vary depending on the facts and circumstances of the case." *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992).

various property in joint ownership. Any ownership interest in the Ardmoor house held by plaintiff was separate property and not subject to division because defendant did not contribute to the acquisition and improvement of the house, nor did he establish need to invade the separate property considering the disparate income of the parties. *Reeves, supra* at 493-495.

With regard to the Veterans Administration (VA) benefit, the evidence clearly supported the trial court's finding that the benefit was not a marital asset. Plaintiff's potential right to the VA benefit accrued at the time her first husband died in Vietnam, and the right vested at the time her divorce from defendant was finalized. The VA benefit was similar to an inheritance, in that the right to the benefit or inheritance had nothing to do with the other spouse, and there is no issue of commingling because the VA benefit was not available to plaintiff during this marriage. See *Dart v Dart*, 460 Mich 573, 584-585; 597 NW2d 82 (1999). The VA benefit was plaintiff's separate property and not subject to division. *Reeves, supra* at 493-495. Defendant's argument that the monthly VA benefit should entitle him to a greater portion of the marital estate lacks merit because the parties stipulated to a fifty-fifty division of the marital estate.

We find no error in the trial court's exclusion of the Corvette titled in plaintiff's name from the marital estate. The evidence established that the Corvette was possessed, used, and paid for, by the parties' son. Plaintiff testified that she never used the Corvette, and there was no evidence that any marital funds were used for the car after their son took possession.

With respect to the Lincoln Continental, we conclude that the trial court did not err in awarding plaintiff the value of the car. The court believed that defendant was involved in the disappearance of the Lincoln based on defendant's demeanor at trial and the fact that the car disappeared the evening the Friend of the Court referee recommended that it be awarded to plaintiff. As discussed above, we believe that the trial court reasonably concluded that defendant was being deceptive, especially in light of evidence that defendant was untruthful about his gun collection.

Having determined that the trial court properly excluded from the marital estate the Corvette, the VA benefit, the Ardmoor house, and the bank account, as well as awarded plaintiff the value of the Lincoln, the question becomes whether the distribution of the marital estate was disproportionate, considering the stipulation to a fifty-fifty division.

Plaintiff was awarded \$75,000 as her interest in the marital home and defendant was awarded ownership of the home. The marital home was valued at \$212,000 by plaintiff and \$201,000 by defendant. The debt on the home was approximately \$58,000, leaving an equity of \$154,000 or \$143,000, depending on the valuation. Accordingly, the \$75,000 award to plaintiff was essentially an equal division of the equity in the marital home.

Defendant's retirement benefits and the TESPHE account with Ford Motor Company were divided equally. Each party was awarded fifty percent of each asset.

The parties stipulated that the 1997 Ford diesel pickup truck and the Lincoln were comparable in value. Plaintiff was awarded the Ford, and the trial court treated the Lincoln as if it were retained by defendant based upon the court's findings in that regard. In its opinion, the trial court indicated that plaintiff was entitled to the value of the Lincoln. Although it appears at

first glance that plaintiff received both the Ford and the value of the Lincoln, our review of the judgment of divorce reveals that plaintiff received only the Ford, which itself constitutes the value of the Lincoln pursuant to the parties' stipulation. Accordingly, the division of the parties' vehicles was equal.

Plaintiff was awarded an IRA at Great Lakes Bank valued at \$23,156, a life insurance policy with Metropolitan Life valued at \$4,525, an interest in a land contract valued at \$19,500, a travel trailer valued at \$4,500, and \$29,500 cash, totaling \$81,181 in assets and funds awarded to plaintiff.

Defendant was awarded a total of \$66,800 in assets, in addition to assets which are referenced on the personal property list but which do not have a corresponding value noted. The personal property list includes an antique lamp, several items of hunting gear, and jewelry. Although there is a \$14,381 difference in the valued property awarded to the parties, the items which were awarded to defendant without values attached clearly were not without value which increases the \$66,800, thereby further narrowing the disparity between the parties. Additionally, the parties were each awarded miscellaneous items in their possession for which no values were assigned.

Defendant challenges the trial court's valuation of the gun collection as excessive, and argues that plaintiff was not competent to value the collection. We disagree. Plaintiff submitted a list of personal property which estimated that the gun collection was worth between \$30,000 and \$40,000. Defendant did not object to the admission of this list into evidence. Moreover, the trial court was not presented with any other evidence regarding the value of the gun collection, and defendant was deceptive and uncooperative regarding his guns. *Wiand v Wiand*, 178 Mich App 137, 145-146; 443 NW2d 464 (1989). We find no error.

Defendant further argues that the trial court should have considered the value of plaintiff's business which was developed during the marriage. The trial transcript indicates that there was no evidence presented regarding the value of plaintiff's business. An issue is not properly preserved if it is not raised before and addressed by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Accordingly, we decline to address this argument. *In re Green Charitable Trust*, 172 Mich App 298, 329; 431 NW2d 492 (1988).

Although the parties stipulated to an equal apportionment of the marital estate, the trial court's division of property was essentially an equal division of the marital estate in light of the full extent of assets valued at several hundred thousand dollars. The trial court's written opinion indicates that it considered the parties' trial briefs as well as the evidence offered at trial in making its determination. As this Court noted in *Byington v Byington*, 224 Mich App 103, 114-115; 568 NW2d 141 (1997), citing *Knowles v Knowles*, 185 Mich App 497, 501; 462 NW2d 777 (1990), "[e]ach spouse need not receive a mathematically equal share, but significant departures from congruence must be explained clearly by the court." We disagree with defendant's claim that the court's findings were insufficient to justify the division of assets. The court noted defendant's refusal to respond to discovery requests and his untruthfulness with the Friend of the Court referee. We conclude that the trial court's findings were not clearly erroneous, and the judgment of divorce was fair and equitable. *Draggoo, supra* at 429.

Finally, defendant contends that the trial court erred in awarding plaintiff \$5,000 in attorney fees. Although plaintiff failed to make a specific request for the payment of attorney fees in her complaint, at trial she asked the court to award her attorney fees because of defendant's conduct during the litigation.

This Court reviews a trial court's decision to award attorney fees for an abuse of discretion. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). An abuse of discretion is found only in extreme cases in which the result is so grossly and palpably violative of fact and logic that it evidences a perversity of will or the exercise of bias or passion. *Phillips v Jordan*, 241 Mich App 17, 29; 614 NW2d 183 (2000).

Attorney fees may be authorized when the party requesting the fees has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). We hold that the trial court did not abuse its discretion in awarding plaintiff attorney fees because of defendant's unreasonable conduct.

Plaintiff filed motions to show cause why defendant should not be held in contempt for failure to comply with court orders and the judgment of divorce, as well as a motion to enforce the property provisions of the judgment of divorce with which defendant had not complied. In addition, defendant filed a motion seeking relief from the judgment of divorce on the basis, in part, that plaintiff committed a fraud on the court by submitting the property list at trial with grossly overstated values, including an estimate of the value of the gun collection. However, defendant failed to submit documentation at trial regarding the value of those assets and he failed to object to the values submitted by plaintiff. There was evidence that defendant even blocked attempts to ascertain the true value of marital assets. The record is replete with evidence of defendant's unreasonable conduct throughout the divorce proceedings. We find no abuse of discretion in the trial court's decision to award plaintiff attorney fees.

Defendant further argues that the award of attorney fees was not supported by any evidence of the amount of fees actually incurred. Defendant did not challenge the reasonableness of the attorney fees awarded in the trial court. Accordingly, this issue is unpreserved and we need not address it further. *Russell v Department of Corrections*, 234 Mich App 135, 139; 592 NW2d 125 (1999).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Helene N. White
/s/ Michael J. Talbot