

STATE OF MICHIGAN
COURT OF APPEALS

SARAH STROUD RAINEY,

Plaintiff-Appellant,

v

JOHN M. RAINEY,

Defendant-Appellee.

UNPUBLISHED

November 30, 2001

No. 219323

Wayne Circuit Court

Family Division

LC No. 93-320638-DM

Before: Saad, P.J., Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

Plaintiff Sarah Rainey appeals as of right, challenging the trial court's rulings on alimony and property distribution in an amended judgment of divorce. In a prior appeal, this Court affirmed the judgment of divorce in part, reversed in part, and remanded for further proceedings on the issues of alimony and property distribution, among other issues.¹ We again reverse and remand for further proceedings.

I. Basic Facts And Procedural History

This divorce case has a long history. It began in July 1993, when Sarah Rainey filed a complaint for divorce, alleging an irreparable breakdown of the marriage because of defendant John Rainey's alleged misuse of alcohol and prescription drugs. Following lengthy proceedings, the trial court in late 1994 delivered its oral opinion, stating in pertinent part:

The next issue is the financial assets and disposition of them. I'll start with the award to Mrs. Rainey.

Mrs. Rainey is awarded all of her jewelry, the car she's currently driving, and the following financial assets: The first category she's being awarded, basically, is property that she received from her parents that were gifts from her parents.

¹ See *Rainey v Rainey*, unpublished opinion per curiam of the Court of Appeals, issued May 13, 1997 (Docket No. 185876).

Now the stock. The account of Paine-Webber, which has a market value, according to Mrs. Rainey's testimony, and briefs submitted by the wife's attorney, Mr. Prather, has a market value of \$131,304.00.

Next are the treasury [sic] bills. They're worth \$100,000.00. The wife is awarded the First Federal savings account in the amount of \$42,672.00, the wife's Standard Federal Savings account of \$3,741.00, the wife's Griffin promissory note, which has a current market value of \$11,000.00; the wife's Dearborn School Credit Union savings account which currently has an approximate balance of \$30,147.00, the wife's Dearborn Credit Union checking account of \$23,389.00, and a 1993 income tax refund held by Mr. Prather, apparently in his trust account that has a value of \$9,832.00.

That totals \$351,985.00. All those assets the Court just listed are hereby awarded to Sarah Rainey, as her sole and separate property.

Second, Mrs. Rainey is awarded \$5,000.00 in the Comerica checking account. The \$33,643.00 currently held in the husband's IRA account will be awarded to the wife.

So, that will be transferred into her name by operation of the judgment.

The next award to Mrs. Rainey is the husband's KEOGH account of \$125,582.00, approximately. That is awarded as her sole and separate property.

That will be transferred to her name via the divorce judgment.

The wife is awarded a one half interest--she'll hold, as tenants in common with her husband, the SunTree investment, which . . . worth \$50,000.

So each is going to receive about \$25,000.00 . . .

And the last asset that Mrs. Rainey will receive is \$150,000.00 from the TIAA account of the husband. That will be transferred to her name via QDRO.

* * *

This leaves her with an approximate award to the wife of about seven hundred thousand dollars.

In addition to that, the Court notes, although I have no jurisdiction to control it, she has a trust worth about three hundred fifty thousand dollars.

So that leaves, in the Court's opinion, Mrs. Rainey leaving the marriage with a net worth of about one million, fifty thousand.

If this money were invested and received a yield of ten percent, which is not unrealistic, although the stock market has not been good this year, it is not

unrealistic to expect a return of ten percent a portfolio, managed properly in a mutual fund, or a bond fund.

So with her forty-two thousand dollars in income as a librarian, and a million dollars net worth of assets in stocks, bonds, and cash, she should be able to achieve an annual income of between one hundred thirty and one hundred forty thousand dollars.

Mr. Rainey testified his income was somewhere between one hundred forty and one hundred sixty thousand dollars, after he pays his overhead.

I'll assume it's about a hundred sixty thousand dollars and take the [h]igher figure.

The Court does not see any need for alimony, considering the substantial net worth of Mrs. Rainey, and what she can receive from investments and salary, one hundred forty thousand dollars, and she's departing the marriage a millionaire.

. . . The Court hereby awards the husband, John Rainey, sole possession and interest in the marital home, which has an approximate value of three hundred sixty thousand dollars.

He is awarded the balance of the TIAA account, which, according to the briefs, start out with \$515,000.00 or \$516,000 balance. He'll be left with about \$360,000.00 in the TIAA account. That is awarded as his sole and separate property.

The husband is awarded the CREF account, which has an approximate value of \$7,083.00.

The husband is awarded the Chrysler minivan worth \$2,000, the 1982 Mercedes, worth \$3,500.00. That's a thirteen year old vehicle.

The husband is awarded--there's a 1982 Jetta, worth \$1,000. The husband is awarded that vehicle. And the husband is awarded a sailboat worth \$10,000.00, a Kevair canoe, worth \$1,000.00, a Kayak, worth \$1,000.00.

The husband is awarded the Suisse Bank account. That has an approximate balance of \$4,862.00. The husband is awarded the life insurance policy, which has an approximate cash value of \$20,000.00.

. . . I believe that disposes of all the assets.

* * *

I want to make one more comment. I believe that leaves the husband with a net worth somewhere in the area of \$750,000.00. Relative to Mrs. Rainey's net worth of approximately one million, fifty thousand dollars, and because of the

disparity of net worth departing from the marriage, the Court will not award alimony to either party.

The trial court also awarded Sarah Rainey her retirement fund. In late April of 1995, the trial court entered a judgment of divorce, reflecting its opinion. Sarah Rainey appealed and John Rainey cross-appealed from the judgment. In mid-May of 1997, this Court issued an opinion, affirming in part, reversing in part and remanding for further proceedings. Of relevance to this appeal, this Court concluded that, in denying Sarah Rainey's request for alimony, the trial court failed to consider and weigh certain factors including the length of the parties' marriage, the parties' past relations and conduct, their ages, needs, ability to work, health, and fault:

Here, the trial court relied on the ability of the parties to pay, never addressing the other factors. In assessing plaintiff's annual income, the court erroneously determined that plaintiff had a trust worth \$350,000, and concluded that, if she properly invested this asset, plaintiff would have income equal to defendant's. The record shows that, although plaintiff was receiving yearly interest proceeds of approximately \$21,225 from a trust fund set up in her father's will, there was no provision for her to receive any of the corpus of the trust. Therefore, the lower court erred by failing to make findings of fact which we can identify on most of the relevant factors, and erroneously analyzed the parties' ability to pay. Therefore, *we remand for further findings of fact and a new disposition if warranted.*^[2]

This Court also held that the trial court's division of the marital estate was not fair and equitable, holding that the court failed to determine what constituted the marital estate:

Here, the lower court failed to adequately determine what constituted the marital estate. Although the court termed several of plaintiff's assets as her sole and separate property, he included them in the final distribution of the marital estate. Moreover, he placed no findings of fact on the record indicating that defendant had contributed to the acquisition, improvement or accumulation of the property. Therefore, *we remand for the judge to reanalyze the issue under the relevant facts and make new findings and a new disposition.*^[3]

This Court also found that the trial court abused its discretion by denying Sarah Rainey's request to make an offer of proof relating to John Rainey's fault, and directed the trial court to allow Sarah Rainey to make an offer of proof on remand.

On remand, the trial court held a hearing in mid-August of 1997, during which it took additional comments from the parties regarding the issues on remand. The hearing was ultimately adjourned because Sarah Rainey was not prepared to make an evidentiary offer of proof on John Rainey's alleged drug and alcohol abuse. In late October of 1997, the hearing on

² *Rainey v Rainey, supra*; emphasis supplied.

³ *Id.*; emphasis supplied.

remand was continued, and the trial court stated its opinion on the record. The trial court stated, in pertinent part:

In the Court of Appeals' opinion, Section II, they refer to the alimony issue. They remand for further findings of fact and a new disposition if warranted.

That ties into issue four, where the Court said that this Court failed to adequately determine what constituted the marital estate, so I'll list now what I consider the marital estate, based on the assets of the parties, which we relied on at the time of the divorce.

Payne [sic] Webber, one hundred thirty-one thousand, three—four hundred four. The Treasury Bills, one hundred thousand.

The First Federal Savings account, forty-two thousand, six hundred seventy-two dollars. The Standard savings account, three thousand, seven hundred forty-one dollars.

The Griffin promissory note, eleven thousand. Dearborn School Credit Union savings account, thirty thousand, one hundred forty-seven dollars.

The Dearborn School Credit Union checking account, twenty-three thousand, three hundred eighty-nine.

The 1993 income tax refund, nine thousand, one hundred thirty-two dollars.

The Comerica checking account, five thousand dollars. Mrs. Rainey's IRA, thirty-three thousand, six hundred forty-three dollars.

Mr. Rainey's KEOGH, one hundred twenty-five thousand, five hundred eighty-two dollars. Fifty percent of the Sun Tree investment, twenty-five thousand.

* * *

Wait. The TIAA account, Mrs. Rainey's portion, the Court awarded her one hundred fifty thousand dollars.

The marital home, three hundred sixty thousand. The balance of the TIAA account, Mr. Rainey receives three hundred sixty thousand.

The CREF account, seven thousand, eighty-two dollars. Minivan, two thousand. The 1982 Mercedes, three thousand, five hundred. The 1992 Jetta, one thousand. Sailboat, ten thousand. Canoe, one thousand dollars. Kayak, one thousand.

Swiss Bank account, four thousand, eight hundred sixty-two dollars. Life insurance, twenty thousand. Then another fifty percent of the Sun Tree account is twenty-five thousand.

It is the Court's opinion the marital estate is valued at one million, four hundred eighty-six thousand, six fifty-five. Mrs. Rainey had a trust account with three hundred thousand dollars in it.

* * *

A moment ago, the Court said the total marital estate was one million, four hundred eight-six thousand, six hundred fifty-five dollars.

I did not account for the lien against the house, the fifty-two thousand. So, the total marital assets is one million, four hundred thirty-four thousand, six hundred fifty-five dollars.

Of that total marital estate, Dr. Rainey received seven hundred forty-three thousand, four hundred forty-five dollars.

Mrs. Rainey received six hundred ninety-one thousand, two hundred ten dollars, plust [sic] the trust account, which is another three hundred fifty thousand, for a total of one million, forty-one thousand, two hundred ten.

She left the marriage with a net worth of one million, forty-one thousand, two hundred ten dollars.

He left the marriage with seven hundred forty-three thousand, four hundred forty-five dollars.

I indicated the last time, on the issue of alimony, I was not awarding any.

I'll amend the judgment of divorce to award—I'm going to the TIAA account Mrs. Rainey is to receive one hundred fifty-thousand dollars from. I consider that to be alimony.

There's five years' alimony there of thirty thousand per year. That does not change the distribution. I'm going to call that something else. I'm going to call that hundred fifty thousand dollars figure alimony.

The reason I originally did not award alimony is because Mrs. Rainey was leaving the marriage with a net worth of three hundred thousand dollars more than Mr. Rainey, but I'll call that alimony.

* * *

I'll state one more time on the record. I don't believe the Court of Appeals understood what I said, and I'll say it one more time.

The marital estate has assets of one million, four hundred thirty-four thousand, six hundred fifty-five dollars. From that, Dr. Rainey received assets of seven hundred forty-three thousand, four hundred forty-five.

Mrs. Rainey received six hundred ninety-one thousand, two hundred and ten, of which I'm calling one hundred fifty thousand of that alimony in gross.

In addition, she received three hundred fifty thousand dollars from a trust. So, Mrs. Rainey is leaving the marriage with a net worth of one million, forty-one thousand, two hundred and ten dollars.

After issuing its opinion on the record, the trial court allowed Sarah Rainey to make an offer of proof on the issue of fault. Sarah Rainey's offer of proof included evidence that John Rainey had prescribed numerous pills to himself, and allegations that he had created a hostile environment for her. In mid-April of 1999, the trial court entered an amended judgment of divorce, reflecting its oral opinion. With regard to this Court's directive to make additional findings of fact, the trial court stated the following in its amended judgment of divorce:

(n) After careful review and consideration, the Court having considered the decision and opinion of the Court of Appeals and the argument of counsel, and in recognition of the Parrish [138 Mich App 546; 361 NW2d 366 (1984)] and Hanaway [208 Mich App 278; 527 NW2d 792 (1995), lv den 451 Mich 874 (1996)] factors (the length of the parties' marriage, the ability each of them has to pay alimony, the needs of the parties, their ages, their abilities to work, fault, and the past relations and conduct of the parties), this Court rendered its award of alimony-in-gross and property division. In reaching an equitable distribution of Property this Court has considered the aforementioned facts and noted the award to Wife of her beneficial interest in the trust set up under her father's will and included same in making the division of property and awarding alimony.

Sarah Rainey moved for reconsideration of the trial court's ruling regarding alimony, which it denied. Sarah Rainey thereafter appealed.

II. Alimony

A. Standard Of Review

Sarah Rainey argues that the trial court erred in failing to make further findings of fact regarding the award of alimony as directed by this Court in its previous opinion. She contends that, without supplying any reason, the trial court simply removed \$150,000 from her marital property award and labeled it as alimony-in-gross, which left the parties in essentially the same position as before. In reviewing dispositional rulings in a divorce case, this Court first reviews the trial court's findings of fact under the clearly erroneous standard and then reviews the dispositional ruling to determine whether it was fair and equitable in light of the facts.⁴ If the

⁴ *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

trial court's findings of fact are upheld, the dispositional rulings will be affirmed unless we are left with the firm conviction that the decision was inequitable.⁵

B. Legal Standards

A divorce court has the discretion to award alimony as it considers just and reasonable.⁶ However, in deciding a divorce action, the trial court must make findings of fact and dispositional rulings.⁷ As this Court observed in its previous opinion in this case, there is no specific formula for determining whether alimony should be awarded, but a trial court should consider certain factors, including the length of the parties' marriage, the ability to pay alimony, the parties' past relations and conduct, their ages, needs, ability to work, health, and fault, if any.⁸ In weighing these factors, the trial court should make *specific findings of fact* as to the factors that are relevant to the particular case.⁹ In *Beason v Beason*,¹⁰ the Michigan Supreme Court explained that "[i]n its fact-finding role, the trial court must hear the evidence, choose which witnesses to credit when the evidence conflicts, and, pursuant to MCR 2.517, *must place findings of fact on the record or in a written opinion.*"¹¹

C. The Trial Court's Findings Of Facts

After reviewing the trial court's opinion on remand and the amended judgment of divorce, it is apparent to us that, once again, the trial court failed to make specific findings of facts on all the relevant factors. The trial court's mere assertion that the relevant factors were considered, without any recitation of the related findings, is insufficient. Indeed, the trial court appears to repeat many of the errors present in the original judgment of divorce. In addition, in this Court's previous opinion, we directed the trial court to allow Sarah Rainey to make an offer of proof on the issue of fault, which is a relevant factor. Although the trial court allowed Sarah Rainey to make an offer of proof on remand, the trial court did so *after* it issued its opinion regarding alimony and property division. As such, it is questionable whether the trial court actually considered the fault factor. Because the trial court failed to make the necessary findings of fact on the record, we cannot properly review its ultimate dispositional ruling concerning whether the award of alimony was equitable. On remand, we emphasize that the trial court *must* make specific findings of fact on the record and fashion a new disposition if warranted.

⁵ *Id.*; *Ianitelli v Ianitelli*, 199 Mich App 641, 642; 502 NW2d 691 (1993).

⁶ *Ianitelli*, *supra* at 642-643.

⁷ *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996).

⁸ *Ianitelli*, *supra* at 643.

⁹ *Id.*

¹⁰ *Beason v Beason*, 435 Mich 791, 798; 460 NW2d 207 (1990), quoting from *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

¹¹ *Id.*; emphasis supplied.

III. The Marital Estate

Sarah Rainey argues that, on remand, the trial court again failed to properly segregate her property from the marital estate, and failed to make findings of fact supporting its division of the marital estate as specifically directed by this Court. We apply the same standard of review as set out above. The distribution of property in a divorce is controlled by statute.¹² A trial court's first consideration when dividing property is the determination of marital and separate assets.¹³ Generally, the marital estate is divided between the parties, but the parties' separate assets may not be invaded.¹⁴ A party's separate estate can be invaded for distribution when the other party contributed to the acquisition, improvement, or accumulation of the property, or when a division of the marital assets alone is insufficient for suitable support and maintenance.¹⁵

Further, as stated in this Court's previous opinion in this case, the goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property.¹⁶ "When dividing the [marital] estate, the court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health, and needs, fault or past misconduct, and any other equitable circumstance."¹⁷ While each spouse need not receive a mathematically equal share, any significant departures from congruence must be explained clearly by the court.¹⁸ The significance of these factors will vary from case to case and each factor need not be given equal weight where the circumstances dictate otherwise.¹⁹

Here, from the inception of the case, Sarah Rainey has maintained that certain trust property, valued at approximately \$351,985, must be excluded from the marital estate because it is her separate property, acquired before the marriage or by inheritance or gift after the marriage. However, on remand, the trial court again failed to properly analyze the parties' property and segregate Sarah Rainey's assets from the marital estate before distributing the estate. Instead, the trial court simply repeated its previous property determination, which we indicated was improper, without further findings of fact concerning whether John Rainey had contributed to the acquisition, improvement or accumulation of the property, or that the marital estate was insufficient for suitable support. Therefore, we conclude that it was improper for the trial court to include any amount of Sarah Rainey's separate property in the marital estate.

Moreover, when Sarah Rainey's claimed separate assets are deleted from the property divided by the trial court, the property division inequitably favors John Rainey. Accordingly, we

¹² MCL 552.1 *et seq.*

¹³ *Byington v Byington*, 224 Mich App 103, 114, n 4; 568 NW2d 141 (1997).

¹⁴ *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997).

¹⁵ MCL 552.23 and 552.401.

¹⁶ *Sands, supra* at 35, quoting from *Sparks, supra* at 158-160.

¹⁷ *Byington, supra* at 115, citing to *Sparks, supra* at 158-160.

¹⁸ *Id.* at 114-115.

¹⁹ *Id.* at 115.

remand for the trial court to make the required findings of fact essential to a proper resolution of the legal question and for an equitable property division. On remand, the trial court should not consider as part of the marital estate any portion of Sarah Rainey's separate property unless the statutory requirements are satisfied.²⁰

IV. Attorney Fees

A. Standard Of Review

Sarah Rainey claims that the trial court erred when it denied her motion for attorney fees and costs where John Rainey failed to comply with the judgment of divorce and "other orders." We review a trial court's decision to award attorney fees for an abuse of discretion.²¹

B. Legal Standards

Attorney fees in a divorce action may be awarded as necessary to enable a party to prosecute or defend a suit.²² Attorney fees may also be authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation.²³ A party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support.²⁴

C. Violation Of Court Orders

Here, the record does not support Sarah Rainey's claim that John Rainey was in continual violation of court orders or the judgment of divorce, causing her to incur substantial attorney fees. Rather, the record shows that both parties had issues with the judgment of divorce, as well as other orders, and that, for the most part, John Rainey was advocating his position. We also note that Sarah Rainey has failed to allege facts sufficient to show that invasion of her supporting assets would be required to pay her attorney fees, or that she is unable to bear the expense of this action.²⁵ Accordingly, we conclude that the trial court's denial of her request for attorney fees was not an abuse of discretion.

²⁰ We note that, with regard to the property distribution, Sarah Rainey sought an award of \$32,000 as her separate property pursuant to promissory notes signed by John Rainey to her. On remand, if it is determined that the money was borrowed from Sarah Rainey's separate estate as claimed, the promissory notes should not be dismissed because "[t]he lion's share of income to support the family over that time period came from [John Rainey]" as the trial court concluded.

²¹ *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998), citing to *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997).

²² *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995), citing to *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993).

²³ *Hanaway*, *supra*, citing to *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2d 394 (1992).

²⁴ *Hanaway*, *supra*, citing to *Maake*, *supra* at 189.

²⁵ MCR 3.206(C)(2).

Reversed and remanded for further proceedings consistent with this opinion. Given the history of this matter, it shall be assigned to a different trial court judge on remand. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ William C. Whitbeck