STATE OF MICHIGAN

COURT OF APPEALS

LARRY J. MENNETTI,

Plaintiff-Appellee,

v

MICHELE D. MENNETTI,

Defendant-Appellant.

UNPUBLISHED
December 21, 2001

No. 226474
Kent Circuit Court
LC No. 98-000718-DO

Before: Gage, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's judgment of divorce that equally divided the equity in the marital home on the basis of its 1995 state equalized value (SEV), divided many items of personal property, and awarded plaintiff $5,000 in attorney fees. We affirm the trial court's division of the marital assets, but reverse the award of attorney fees.

Defendant first contends that the trial court erred in failing to apply the marital home's 1999 SEV, which more closely approximated the home's value when the court entered the judgment of divorce in early 2000. In a divorce case, this Court must first review the trial court's findings of fact regarding the valuations of particular marital assets under the clearly erroneous standard. A finding is clearly erroneous when, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made. This Court gives special deference to the trial court's findings when they rest on the credibility of the witnesses. If the trial court's findings of fact are upheld, this Court must then decide whether the dispositive ruling was fair and equitable in light of those facts. The dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Draggoo v Draggoo*, 223 Mich App 415, 429-430; 566 NW2d 642 (1997).

The trial court utilized the 1995 SEV of the home to calculate that the equity existing in the home in 1995 equaled $120,432.26, then awarded each party exactly one-half this amount. For the purpose of dividing marital property, assets typically are valued at the time of trial or at the time judgment is entered. In determining the valuation date, however, the trial court retains considerable discretion to see that equity is done by valuing the asset as of either the date of trial, the date of judgment, or a more appropriate date. *Byington v Byington*, 224 Mich App 103, 114, n 4; 568 NW2d 141 (1997). The court properly may consider manifestations of intent to lead separate lives when apportioning the marital estate. *Id*. at 113-114.

Testimony showed that defendant left the marital home in July 1995, and since then had resided in Pennsylvania where she attended medical school. Defendant did not return to the marital home during holidays and breaks from school, and had last visited the home in June or July 1996. Defendant saw plaintiff on only one occasion between July 1995 and the time of trial. Defendant acknowledged that after she left the marital home in 1995, she made no mortgage or tax payments and did not otherwise contribute to any home improvements or maintenance. Plaintiff assumed responsibility for the home's mortgage, taxes, and other expenses, but according to defendant did not pay any of defendant's medical school costs. Plaintiff, who advised defendant before she left for medical school that she would be going to Pennsylvania alone, did not telephone defendant after January 1996. Although defendant testified that she had hoped that she and plaintiff would reunite when defendant finished medical school, ample evidence supported the trial court's determination that the parties had publicly manifested their intent to lead separate lives. *Byington*, *supra*; *Wilson v Wilson*, 179 Mich App 519, 523-524; 446 NW2d 496 (1989).

Because the trial court did not clearly err in determining that the parties began leading separate lives in 1995 when defendant left the marital home, *Draggoo*, *supra*, we cannot conclude that the trial court abused its discretion in utilized the SEV of the home in 1995, the date after which defendant no longer contributed anything toward mortgage, tax, or other home-related payments, as the basis for the home's valuation. *Byington*, *supra*. Furthermore, we find equitable the trial court's award of exactly one-half of the home's 1995 equity to each party.

To the extent that defendant raises various challenges to the trial court's disposition of personal property to the parties, including that (1) the personal property division was unequal, (2) the trial court failed to assign valuations to the various personal property items awarded, (3) the trial court failed to discuss the factors governing property distribution in making its award, (4) the trial court improperly weighed the factors that it did consider, and (5) the trial court acted on a bias and prejudice against defendant, we are unable to consider these claims because the record contains no evidence of the values of the parties' many items of personal property. Two separate property lists attached to the judgment of divorce contain no appraisals of the worth of the items listed. While defendant apparently prepared an itemized list of personal property that also contained estimates of worth for each item, this list was not admitted into evidence. The only indication of the items' value was defendant's testimony that she estimated their total worth at $48,400. We conclude that defendant's arguments regarding an inequitable distribution of personal property must fail because defendant did not satisfy her burden of proving the items' reasonably ascertainable values. *Wiand v Wiand*, 178 Mich App 137, 149; 443 NW2d 464 (1989) ("The general rule applicable to valuation of marital assets is that the party seeking to include the interest in the marital estate bears the burden of proving a reasonably ascertainable value; if the burden is not met, the interest should not be considered an asset subject to distribution.").

Plaintiff lastly asserts that the trial court improperly awarded plaintiff attorney fees amounting to $5000. In its discretion, a court may award attorney fees to a party in a domestic relations matter who is unable to bear the expense of attorney fees if the other party has the ability to pay. The party requesting the fees must allege facts sufficient to show that they are unable to bear the expense of the action. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999), citing MCR 3.206(C)(2). Attorney fees also may be appropriate if the requesting

party has been forced to incur expenses because of the other party's unreasonable conduct in the course of litigation. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995).

It appears from the trial court's opinion that the court imposed attorney fees on defendant for her failure to produce an appraisal of plaintiff's gun collection on the third and last day of the trial.[1] Although defense counsel had expressed her intent to introduce an appraisal on the third day of trial, the trial was not expanded beyond two days solely for this purpose. The second day of trial ended when the court interrupted defense counsel's direct examination of defendant, which continued on the third day of trial. Although defendant was the only witness who testified on this third day, we find that the remaining testimony defendant proffered on her behalf was relevant to the case. Plaintiff also cross examined defendant on the third day of trial. Despite the trial court's noted impatience with the proceedings, we are unable to detect within the record any unreasonable conduct by defendant that unduly prolonged the litigation.[2] *Hanaway*, *supra*. Furthermore, plaintiff failed to present any facts tending to show his inability to bear the expense of the action or that defendant had the ability to pay the attorney fees the court imposed, MCR 3.206(C)(2), and did not even present evidence of what amount of attorney fees he incurred during the action. Under these circumstances, we conclude that the trial court abused its discretion in awarding plaintiff attorney fees. *Kosch*, *supra*.

We affirm the trial court's valuation of the marital home and property disposition, but reverse that portion of the judgment of divorce awarding plaintiff attorney fees.

/s/ Hilda R. Gage
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

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[1] At the end of the second day of trial, defense counsel indicated that she intended to call an appraiser to testify regarding the value of plaintiff's gun collection. When plaintiff's counsel requested the appraiser's name, defense counsel responded that she did not have his name. The trial court expressed its opinion that defense counsel was unprepared and that "[t]here was no question this case was going to be over today except for these meanderings that we're going through. It's a total waste of time, but that's the way certain people want to do it." The court nonetheless scheduled another half-day of trial, at which defendant did not call any appraiser to testify.

[2] Although it appears from the parties' briefs that either they or their counsel disdain each other, we detect in the record and briefs no gross improprieties committed by anyone involved in this case that would warrant our acceptance of either party's invitation to impose an appellate sanction on the other party.