

STATE OF MICHIGAN
COURT OF APPEALS

CYNTHIA G. NAGTZAAM,

Plaintiff-Appellant,

v

GERALD R. NAGTZAAM,

Defendant-Appellee.

UNPUBLISHED

June 21, 2002

No. 229150

Gratiot Circuit Court, Family
Division

LC No. 99-005649-DM

Before: Owens, P.J., and Sawyer and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment of divorce, challenging the court's property division and award of attorney fees. We affirm in part and reverse in part.

Plaintiff contends that the trial court clearly erred by awarding defendant his entire pension where he was found to be at fault for the breakdown of the marriage, and where the resulting property distribution was inequitable. We agree.

We review a property distribution in a divorce case by first reviewing the trial court's factual findings for clear error, and then determining "whether the dispositional ruling was fair and equitable in light of the facts." *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995). In determining whether the property distribution was fair and equitable, we will consider:

[The] source of the property; the parties' contributions toward its acquisition, as well as to the general marital estate; the duration of the marriage; the needs and circumstances of the parties; their ages, health, life status, and earning abilities; the cause of the divorce, as well as past relations and conduct between the parties; and general principles of equity . . . [as well as] the interruption of the personal career or education of either party. [*Id.* at 292-293.]

Generally, a property distribution will be affirmed unless we are "left with the firm conviction that the distribution was inequitable." *Id.* at 292.

As noted above, plaintiff's challenge to the property distribution concerns the trial court's decision to award defendant his entire pension. It should be noted that the trial court also

awarded plaintiff her entire pension.¹ Excluding the parties' pensions, the trial court awarded plaintiff approximately fifty-one percent of the marital estate. According to the parties' stipulation, the "present day value" of her pension was only \$47,149.00, whereas the "present day value" of his pension was \$418,635.74. Thus, once the values of the pensions are factored in, defendant received approximately seventy-eight percent of the marital estate—leaving plaintiff a mere twenty-two percent. From a mathematical standpoint alone, we are left with a firm and definite conviction that this property division is plainly inequitable. This is especially so where the trial court opined that there was fault attributable to defendant and that the other factors were essentially balanced.² See *Hanaway*, *supra* at 292-293.

Defendant contends that he was properly awarded his entire pension because he only receives a monthly benefit, and will never receive a "lump sum." However, even though defendant will never receive a "lump sum," he stipulated to his pension's "present day value" of \$418,635.74. Thus, the trial court was required to accept this figure for purposes of calculating the parties' marital estate. It is well established that "a party cannot request a certain action of the trial court and then argue on appeal that the action was error." *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Thus, even though the disability pension is similar to income, defendant cannot dispute that the proper value to be ascribed to his pension for purposes of dividing the marital estate should have been \$418,635.74.

Nevertheless, although defendant may not properly challenge his pension's value, we do not believe that it would be fair or equitable to award plaintiff a lump sum of \$209,317.87 (one-half of \$418,635.74). Indeed, defendant correctly notes that the specifics of the pension render it very similar to income. Accordingly, we believe that the fair and equitable method of distributing defendant's pension is to distribute it by awarding each party one-half of defendant's disability pension as it is received on a periodic basis. Such a division will allow both parties to equally benefit from the pension, a marital asset that exists because of the parties' joint contributions. Similarly, we believe that the stipulated value of plaintiff's pension should also be split equally between the parties. This will result in plaintiff receiving a fair and equitable fifty-one percent of the marital estate.

On the record before us, we decline plaintiff's request for a disproportionate award predicated on fault. While the parties' conduct during the marriage may be relevant to the distribution of property, the trial court must consider all the relevant factors, and should not assign disproportionate weight to any one factor, including fault. See *McDougal v McDougal*,

¹ The parties do not dispute that the trial court correctly determined that both pensions were part of the marital estate. See MCL 552.18(1) *VanderVeen v VanderVeen*, 229 Mich App 108, 110-111; 580 NW2d 924 (1998).

² It should be noted that the trial court supported its unequal property distribution by opining that defendant would be unable to secure employment. We believe that this factual finding is clearly erroneous, inasmuch as defendant's testimony indicated that he only sought jobs in jail administration or in positions for which he was already qualified, and declined to look at alternative employment. Although the challenge of beginning a new career field is daunting, it is not insurmountable.

451 Mich 80, 88-90; 545 NW2d 357 (1996). We agree with the trial court that, while defendant was at fault for his gambling and marital indiscretions, these were not of a frequency and degree to merit an inordinately disproportionate property award in plaintiff's favor. Accordingly, we believe that the fifty-one percent that plaintiff was awarded (before considering the pensions) was a fair and equitable distribution of the marital estate.

Plaintiff also contends that the trial court erred by not awarding her more than \$2,000 in attorneys fees. In support of her argument, plaintiff contends that defendant's conduct caused the litigation and that she "needs funds for support and maintenance." It should be noted that plaintiff requested an award of "at least \$3,000" in attorneys fees below.

"A party in a domestic relations matter who is unable to bear the expense of attorney fees may recover reasonable attorney fees if the other party is able to pay." *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999), citing MCR 3.206(C)(2). We review a trial court's decision to award attorneys fees for an abuse of discretion. *Kosch, supra* at 354. "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Here, at the time of the divorce, plaintiff's income was larger than defendant's disability pension benefit. In fact, of the two parties, plaintiff was actually in a better position to pay her attorneys fees than defendant. At the very least, even accepting plaintiff's contention that she was unable to bear the expense of litigation, the facts do not suggest that defendant had the ability to pay a greater share of her attorneys fees.

Plaintiff suggests that defendant's conduct during the litigation caused her to incur attorneys fees. Indeed, in *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2d 394 (1992), we noted that "[a]ttorney fees are authorized when the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation." However, most of plaintiff's allegations of unreasonable conduct relate to defendant's assertion of reasonable positions below. Moreover, to the extent that defendant's pre-trial conduct *caused* the breakdown of the marriage, this is not relevant to a determination regarding his conduct during the course of the litigation. See *id.* To be sure, the facts do suggest that defendant did engage in one incident of unreasonable conduct. Having concluded that plaintiff was in a better position to pay her attorneys fees than defendant, it is plausible that the trial court's award of attorneys fees was based on this incident. In light of these facts, where plaintiff merely requested "at least \$3,000," we do not believe that the trial court's award of \$2,000 can fairly be characterized as an abuse of discretion. See *Churchman, supra* at 233.

Affirmed in part and reversed in part for further action consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jessica R. Cooper