STATE OF MICHIGAN

COURT OF APPEALS

RONALD A. STEVICK,

Plaintiff-Appellant/Cross-Appellee,

v

PATRICIA ANN STEVICK,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
September 24, 2002

No. 225500
Jackson Circuit Court
LC No. 98-089066-DO

Before: Holbrook, Jr., P.J., and Zahra and Owens, JJ.

PER CURIAM.

The trial court granted a judgment of divorce after a bench trial. Each party was awarded significant property and defendant was awarded spousal support. Plaintiff appeals as of right, raising issues with respect to the property division and the award of spousal support. Defendant cross-appeals, also raising issues with respect to the property division and the award of spousal support. Defendant further argues that the trial court abused its discretion in failing to award her attorney and expert witness fees. We reverse the judgment of divorce to the extent that it provides that the spousal support award is not modifiable. In all other respects, we affirm the judgment.

This Court reviews the trial court's valuation of marital assets under a clearly erroneous standard. *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, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id.* Special deference is given to a trial court's findings when they are based on the credibility of witnesses. *Id.* If the trial court's findings are upheld, this Court must decide whether the dispositive ruling was fair and equitable in light of those facts. *Id.*

I

Plaintiff first argues that the trial court's valuation of the Walz leasehold interest was clearly erroneous. We disagree. Defendant presented expert testimony with respect to the value of the east side of the Walz leasehold. The west side of the leasehold was already mined and there was no profitable interest remaining. Defendant's expert, Dennis Hodge, made several assumptions when valuing the east side of the leasehold at $253,888. Many of these assumptions were based on information that he gathered from conversations with Daniel Stevick, the parties'

son, who worked with plaintiff at his gravel business for numerous years. Plaintiff challenged the assumptions on which the valuation was made and argued that the valuation was not credible. Plaintiff did not, however, present an expert valuation of his own. He argued, without evidentiary support, that the value of the leasehold was $25,000. The trial court accepted Hodge's valuation and awarded the leasehold to plaintiff. On appeal, plaintiff argues that the valuation was clearly erroneous because it was based on improper assumptions. Plaintiff argues that there was no evidence that a conditional use permit would be issued to allow mining on the land. He argues that the assumption that all forty acres could be mined to a depth of thirty feet was not confirmed. He argues that the presumed extraction rate of 700,000 tons of gravel per year was a higher rate of extraction than Stevick Gravel accomplished. Finally, plaintiff also argues that the use of national averages from the United States Geological Survey was improper and that exact figures from Stevick Gravel should have been used.

We disagree that the trial court's valuation was clearly erroneous. Where marital assets are valued between divergent estimates given by an expert witness, the trial court has great latitude in determining the final value for the asset. *Pelton v Pelton*, 167 Mich App 22, 26; 421 NW2d 560 (1988). Moreover, where a trial court's valuation is within the range established by the proofs, no clear error is present. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). See also *Rickel v Rickel*, 177 Mich App 647, 650; 442 NW2d 735 (1989). In this case, plaintiff failed to offer expert testimony to support his valuation and he failed to support his arbitrary figure of $25,000. Thus, the trial court was left to review the only information it had. The trial court was the fact finder not the fact provider. *Perrin v Perrin*, 169 Mich App 18, 21; 425 NW2d 494 (1988). The trial court found that Hodge's figure was credible. We will not disturb that finding where it was within the range of the proofs and was supported by reasonable assumptions. Toward that end, we disagree with plaintiff that Hodge's valuation was objectionable because it was based on assumptions that disregarded established facts. *Badalamenti v William Beaumont Hosp–Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999). First, there was testimony on the record to support that a conditional use permit would be issued to allow mining. The assumption was not pure speculation and there was no contrary testimony to support that such a permit would not be issued. Second, Daniel Stevick believed that he told Hodge that the extraction rate was between 400,000 and 500,000 tons per year on the west side of the leasehold. He guessed that a historical average was 400,000 per year from the Walz pit. He did not categorically reject, however, that 700,000 tons was ever extracted in a year. In fact, he indicated that he was unsure and would have to check. His testimony did not establish that Stevick Gravel's established extraction rate was 400,000 tons per year or that the company was incapable of extracting more than that. Third, while plaintiff complains that Hodge used national averages with respect to operating expenses and sales figures instead of using true figures for Stevick Gravel, he cites no authority to support that the use of recognized averages is not an accepted method of conducting an appraisal. Finally, while plaintiff challenges Hodge's assumption that all forty acres could be mined to a depth of thirty feet, he offered no evidence to rebut this assumption. We conclude that Hodge's assumptions were not unreasonable and did not disregard established facts. The trial court's valuation was within the range of proofs. Thus, we are not left with a definite and firm conviction that the trial court's valuation of the east side of the Walz leasehold was a mistake.

II

Plaintiff next argues that the trial court erred in ordering the Sharon properties to be sold. At the outset, we note that there were two Sharon properties. One was located on Sharon Valley Road. This property does not appear to be the subject of plaintiff's argument on appeal. The second property was a parcel co-owned by Jeb's Gravel, plaintiff's holding company, and Denmar Development, a company owned by Dennis Doan, plaintiff's partner. This is the property subject to plaintiff's argument on appeal. Stevick Gravel held the exclusive leasehold rights to mine gravel on the parcel. The trial court's judgment ordered the *acreage* sold, not the leasehold interest. The proceeds of the sale, if any, were to be divided equally between the parties.

Plaintiff claims that the property was vital to his business future. Plaintiff's trial testimony belies this argument. Plaintiff testified that the property and attendant mining operation were in limbo. Direct access to the property was limited and no agreement had been reached with the adjacent landowner to provide access. In addition, even if an agreement was reached, plaintiff and Doan would have had to construct a road. Further, appropriate zoning changes and a conditional use permit would have to be sought before mining could begin. The trial testimony supported that no serious measures had been investigated with respect to mining the property. Plaintiff testified that he did not know if he would be alive to see the project to fruition. The trial court, in essence, determined that the value of the property would be dictated by the sales price and that the proceeds would be split. This was fair and equitable, especially in light of the entire property division. More importantly, Stevick Gravel's exclusive right to mine the substantial deposit of gravel on that parcel was separate from the underlying fee simple and was not affected by the judgment, which ordered the *acreage* to be sold. Thus, Stevick Gravel's financial future was not thwarted by the trial court's order.

III

Plaintiff also argues that the vacant Crystal Lake lots, valued at approximately $103,000, should not have been awarded to defendant in their entirety because they originally belonged to plaintiff's family and because plaintiff had an emotional attachment to them. We find no error. The parties, together, built their first home on one parcel of land adjacent to Crystal Lake. This parcel was a gift to plaintiff from his family. Later, the parties bought four more parcels from a neighbor. Additional lots were also acquired but those lots are co-owned by the parties and two of their nephews. The evidence supported the finding that plaintiff did not have a good relationship with these nephews while defendant did. The parties agreed that defendant would have the marital home and the lot upon which it sat. Given that the parties agreed defendant should have the home, it was not inequitable or unfair to award defendant the remainder of the lots in the vicinity of the home. Defendant also had an attachment to the property, having lived there for forty years.

IV

Plaintiff further argues that he should not have been responsible for the credit card debt. The overall property division must be considered when weighing this argument. The parties stipulated to the division of most marital assets, giving plaintiff $356,196 in assets and defendant $478,096 in assets. The trial court thereafter awarded plaintiff the east side of the Walz leasehold with a value of $254,000. Defendant received the Crystal Lake lots with a value of $103,000. Any proceeds from the Sharon properties acreage would be divided equally. In total,

plaintiff was to receive approximately $610,196 in assets and defendant was to receive approximately $581,096 in assets. Assigning the entire credit card debt to plaintiff, placed plaintiff and defendant on an almost mathematically equal footing with respect to the distribution of the marital estate. While mathematical equality is not the goal, equity is. *Welling v Welling*, 233 Mich App 708, 710; 592 NW2d 822 (1999); *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993). Considering the duration of the marriage, the contribution of each party to the marital estate, the parties' stations in life, earning abilities, ages, health and needs and the fault attributable to each party, we conclude that the property division was fair and equitable.

V

Defendant argues on cross-appeal that she should have been given one-half of any future profits realized from the gravel mining of the Sharon Township leasehold. We disagree. The leasehold, as previously noted, was an entirely speculative asset. There was no indication on the record that the project would come to fruition in the near future. More importantly, the only valuation of the asset was presented by Hodge and was based on the unsupported assumption that the project would include high volume mining over a short period of time. Doan testified that the project contemplated was low volume mining over a substantial period of time to insure a steady flow of gravel to his business, which had first rights to purchase the gravel. The expert valuation was in direct conflict with Doan's testimony and was therefore objectionable. *Badalamenti, supra.* There was no other information upon which the trial court could rely. Further, the evidence was clear that in order for the project to begin, substantial time and between $150,000 and $200,000 would have to be expended by plaintiff and Doan. We conclude that the trial court correctly refused to value or divide this speculative asset.

VI

Both plaintiff and defendant also argue that the amount of spousal support is not fair or equitable. Plaintiff argues that it is grossly excessive. Defendant argues that it is grossly inadequate. A trial court's factual findings relating to the award of alimony are reviewed for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). If the findings are not clearly erroneous, this Court determines whether the dispositional ruling is fair and equitable. *Id.* at 655. This Court will not modify a trial court's discretionary award of alimony unless we are firmly convinced that a mistake has been made and a different result is warranted. *Tomblinson v Tomblinson*, 183 Mich App 589, 593; 455 NW2d 346 (1990). The trial court awarded defendant $29,500 per year for the first four and one-half years. The award of spousal support dropped to $25,000 after that time. After five additional years, when defendant was eligible for maximum social security benefits, the award was to drop to $12,500 for an additional five years.

At the outset, we find without merit plaintiff's claim that the trial court erred in imputing income to him. It is indeed undisputed that plaintiff took a salary of only $65,000 per year from his business. However, it is evident from a review of the record that the parties maintained a lifestyle that went beyond what a $65,000 salary could sustain. Nancy Uppal was qualified as an expert in the valuation of businesses, including construction businesses. She also prepared a projection of plaintiff's salary for spousal support purposes. She utilized known figures from plaintiff's income tax returns. She calculated the actual cash amounts that plaintiff used to

purchase new equipment for his company. She believed that he could reduce his *cash* expenditures for equipment by forty percent, which would free up additional cash for salary. She based this figure on her analysis of the ratio of company sales to purchases of depreciable property. She assumed, based on conversations with Daniel Stevick, that plaintiff purchased equipment that was not necessary to his operations. In 1996, for example, he bought $644,000 in new equipment, but his sales only increased by $151,000. She noted that the company retained cash to purchase equipment, which was then repaired and resold. She was not suggesting that a reduction in purchases of equipment should occur. Rather, she suggested that a reduction in the amount of cash used to pay for the equipment should occur. Uppal projected an available salary of $131,950 for plaintiff. Daniel Stevick agreed that plaintiff may have been able to take more than $65,000 in salary, but he disagreed that plaintiff could have taken close to $130,000. The trial court did not adopt Uppal's figure of $131,950 or plaintiff's figure of $65,000. Rather, it split the difference and imputed an income of $100,000 to plaintiff.

If a party has voluntarily reduced his income, the trial court may impute additional income to arrive at an appropriate award of spousal support. *Moore, supra* at 655. In this case, defendant voluntarily reduced or eliminated income by only taking a certain salary from his company. The record supported that he had the ability to take a higher salary from his company. The figure imputed by the trial court was within the range of the proofs. Thus, under the circumstances, the trial court did not err in entering the support order based upon defendant's unexercised ability to earn a higher salary.

We also reject defendant's argument on her cross-appeal that the trial court erred in considering her future social security benefits and lowering the spousal support award when she is eligible to take her maximum benefit. This argument presents an issue of law, which is reviewed de novo. *Burba v Burba (After Remand)*, 461 Mich 637, 647; 610 NW2d 873 (2000). The goal of alimony is to balance the *incomes* and needs of the parties. *Moore, supra* at 654. Future social security benefits may be considered for purposes of determining support. MCL 552.602(j)(ii). Trial courts routinely consider future social security benefits in making alimony determinations. See e.g. *Hatcher v Hatcher*, 129 Mich App 753, 761; 343 NW2d 498 (1983).

The trial court considered all of the relevant factors when determining spousal support. We have reviewed the trial court's findings on the relevant factors and conclude that they are not clearly erroneous. In addition, the discretionary award of alimony was fair and equitable. As previously noted, the "main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party." *Moore, supra* at 654. The trial court's award of $29,500 per year for four and one-half years provided defendant with $4,500 per year for her college education.[1] Twenty-five thousand dollars was for her other expenses per year. Defendant testified that she may be able to work part-time while obtaining her degree and, if she ultimately decided not to pursue a degree, she agreed that she could make approximately $10,000 per year. Thus, the award of spousal support was not her sole source of support. There was no

[1] In her cross-appeal, in a one-paragraph argument, defendant insists that the trial court expected her to use her share of the property to obtain necessary training or her degree. This argument has no merit. The trial court awarded defendant additional spousal support to assist in her transition into the work force. It did not expect her to deplete her property for that purpose.

impediment to her working. Further, she received substantial assets in the property settlement. At least one of these assets was designed to produce rental income, and her Florida property could also be used as rental income if she so desired. And finally, she was receiving substantial monthly payments as part of plaintiff's buyout of her half of the company. In sum, she was not impoverished by the award of spousal support in the amount of $29,500. Further, she was not impoverished by the subsequent drops in spousal support. The first drop, after four and one-half years, was to reflect that she should have had sufficient training or education to transition into the work force by that time. The second drop was to account for her receipt of social security benefits. The award was fair and equitable. It was not grossly inadequate.

Similarly, we refuse to find that the award was grossly excessive. Plaintiff indicated below that he would be willing to pay $24,000 per year in support, at least for the first two years, after which time he would request a review. The ultimate award was not radically different than the sum agreed upon by plaintiff. Moreover, assuming that he is correct that he will have to make payments of $54,749 per year to defendant for spousal support and to settle the property division, he is left with at least $45,000 per year, based on his imputed income of $100,000, plus his substantial property award. His assets and salary are more than sufficient to cover the payments owed under the judgment and to maintain a home for himself. Thus, we are not convinced that the discretionary award should be modified. See e.g. *Pelton, supra* at 27.

We conclude, however, that the trial court erred in ordering that the award of spousal support was non-modifiable. MCL 552.28 provides that either party may petition the trial court to revise and alter the judgment with respect to the amount or payment of alimony. It is a statutory right that may be waived only by agreement of the parties. *Staple v Staple*, 241 Mich App 562, 568; 616 NW2d 219 (2000). "[MCL 552.58] will always apply to any alimony arrangement adjudicated by the trial court when the parties are unable to reach their own agreement." *Id*. at 569. The portion of the judgment ordering that spousal support is non-modifiable is reversed.

VII

Defendant asks this Court to order that her portion of the property division be deemed part of the spousal support award so that it can never be discharged in bankruptcy. This issue was not preserved and was not raised in the questions presented. Thus, review is inappropriate. *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 309; 600 NW2d 664 (1999).

VIII

Finally, defendant argues that the trial court abused its discretion in refusing to award her attorney or expert witness fees. The trial court considered the issue of attorney and expert fees because defendant requested those fees in closing statement. The trial court ruled on the issue of attorney fees. While it did not rule on the issue of expert fees specifically, it failed to award those fees. That decision, like the decision with respect to attorney fees, is reviewed for an abuse of discretion. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001).

There is no right to the recovery of attorney fees in a divorce action. *Id.*, citing *Kurz v Kurz*, 178 Mich App 284, 297; 443 NW2d 782 (1989).

> Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit, and this Court will not reverse the trial court's decision absent an abuse of discretion. Attorney fees also may 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. A party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support. [*Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995) (citations omitted).]

A party seeking to obtain attorney fees on the basis of need must allege facts sufficient to demonstrate that she is unable to bear the expense of the action. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). In this case, defendant did not allege any facts or provide any testimony sufficient to demonstrate that she is unable to bear the expense of the action. She did not present evidence at trial to support the amount of her attorney fees or expert witness fees. In *Hanaway, supra* at 299, this Court indicated that if a trial court's award of alimony and property leaves the parties with assets and income comparable to one another, an award of fees is inappropriate. Because there was no evidence to support that defendant could not bear the expense of the action and because she was left in a situation comparable to plaintiff's position, it was not an abuse of discretion for the trial court to refuse to award fees.

In the alternative, defendant argues that she should be awarded fees because of plaintiff's unreasonable conduct in the course of the litigation. Defendant claims that plaintiff's conduct in disputing her claims as to the value of his business and the amount of his income was unreasonable. This is not the type of conduct that may be considered unreasonable for purposes of awarding fees. See *Hanaway, supra* at 298-299. The record does not support that defendant was hindered in any manner from obtaining the information necessary to have her experts value the assets. Defendant was fully aware of the type and nature of the assets. In addition, there is no evidence in the record to support that defendant was forced to incur expenses that she would not otherwise have incurred. No authority supports the proposition that a litigant's conduct will be deemed unreasonable every time he values an asset differently than his opponent at trial. In sum, defendant has not met the requirements to establish that she was entitled to attorney or expert fees. The trial court did not abuse its discretion in denying her request.

That part of the divorce judgment making spousal support non-modifiable is reversed. In all other respects, the divorce judgment is affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ Donald S. Owens