STATE OF MICHIGAN

COURT OF APPEALS

CAROL LOCKHART,

Plaintiff-Appellant,

v

WILLIAM J. LOCKHART,

Defendant-Appellee.

UNPUBLISHED
March 16, 2004

No. 245051
Saginaw Circuit Court
LC No. 98-024225-DO

Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the parties' judgment of divorce, challenging the division of property, the award of spousal support, and the award of attorney fees. We affirm.

I. The Property Division

Plaintiff first argues that the trial court erred in finding that the property owned by defendant on Wallen Road in Saginaw County (the Wallen property) was defendant's separate property not subject to distribution.[1] Specifically, plaintiff asserts that the court erred in finding that she waived her right to the Wallen property when she loaned him an amount of $12,000 toward the purchase of the property.

In a divorce action, the trial court must make findings of fact and dispositional rulings. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). The factual findings are to be upheld on appeal unless they are clearly erroneous. *Id.* A dispositional ruling "should be affirmed unless the appellate court is left with the firm conviction that [it] was inequitable." *Id.*, quoting *Sparks v Sparks*, 440 Mich 141, 152; 485 NW2d 893 (1992). A factual finding is clearly erroneous if, after a review of the trial court's entire record, this Court has the definite and firm conviction that a mistake was made. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997).

[1] The transcripts below provide two different spellings for the word "Wallen." For purposes of this opinion, we follow the spelling used by the parties on appeal.

The trial court found that plaintiff waived her interest in the Wallen property when she signed the promissory note expressly stating that upon repayment of the $12,000 loan, she would have no claim in the Wallen property. A 'waiver' "connotes an intentional abandonment of a known right." *People v Carines*, 460 Mich 750, 762, n 7; 597 NW2d 130 (1999) (quotation omitted).

The parties were married in 1990. At the time, plaintiff was forty-five years old and defendant was forty-nine years old. Each had adult children from previous marriages. Upon their marriage, the parties resided in a mobile home purchased by defendant with premarital funds. Four years later, defendant and his daughter agreed to purchase three plots of land, totaling 222 acres for a total price of $75,000 to pursue a business venture or to be used as hunting property for the benefit of defendant's children. Defendant borrowed against his assets and obtained loans to purchase the land. The evidence established that plaintiff provided one of the loans, for a total amount of $12,000. A promissory note dated December 14, 1994, indicates that the loan to was to be repaid by defendant, his daughter and son-in-law. Beneath their signatures on the note is a sentence that reads: "I Carol A. Lockhart have no claim on the Wallen property after the $12,000.00 is returned to [bank account number]." Plaintiff did not dispute that her signature, dated December 14, 1994, followed the above sentence. For purposes of this appeal only, plaintiff concedes that she was subsequently repaid the amount of $12,000.

One of the parcels of land was conveyed to defendant's daughter while the other two parcels were conveyed to defendant. Plaintiff's name was not included in the title. About one year after the Wallen property was purchased, and a few months after plaintiff's loan was repaid, defendant and his daughter decided to establish an emu farm on the property. Defendant subsequently took out a loan to purchase a modular house for the Wallen property to provide care for the chicks in the basement of the modular house and as a home for him and plaintiff. It was the parties' intent that plaintiff would not be liable for any debts on the Wallen property. Plaintiff resided in the modular house for about two years before she moved in with her mother. The parties had been married for about 7 ½ years when plaintiff initiated the instant divorce proceedings.

Plaintiff testified that she was an uneducated woman with an eighth grade education who had no knowledge of what she was doing when she signed the $12,000 loan agreement with defendant and his children, that she relied on defendant to tell her what to do, that she was unaware that her name was not included in the Wallen property title, and that she believed she signed the note only to protect defendant's daughter's interest in the property. She also testified that she was legally obligated on two subsequent mortgages taken out on the property after she signed the note. We conclude that the testimony was an issue of credibility for the trial court to determine. "This Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses." *Draggoo*, *supra*. The evidence indicated that while plaintiff had reading and writing difficulties due to a childhood injury, she failed to demonstrate that her difficulties affected her reasoning or ability to comprehend the consequences of her acts. Additionally, plaintiff presented no proofs to indicate that she contributed toward the actual payments of the mortgages.

It is clear from our review of the record that, in determining whether plaintiff waived any rights to the Wallen property, the trial court also took into consideration the relatively short duration of the marriage, the fact that plaintiff resided intermittently on the Wallen property for

only two years, that she contributed nothing from her assets toward the maintenance, upkeep or improvements of the property during the four or so years after defendant purchased it, and that the property was being used as a business venture to benefit defendant and his two children, one of whom was disabled. We are not left with a definite and firm conviction that the court's determination that plaintiff waived any right she arguably may have had to the Wallen property was clearly erroneous.

Plaintiff next argues that the distribution was inequitable and that the Wallen property should be invaded because the dispositional ruling failed to consider her contributions to the property and the award was insufficient for her suitable support and maintenance.

The division of marital assets "need not be equal, it must be equitable." *Sparks, supra* at 159. The factors the trial court may consider when relevant to the disposition of assets are: (1) the length of the marriage, (2) each party's contributions to the marital estate, (3) the ages of the parties, (4) the health of the parties, (5) the life status of the parties, (6) the parties' circumstances and necessities, (7) the parties' earning abilities, (8) the parties' past relations and conduct, and (9) general equitable principles. *Id.* at 159-160. The dispositional ruling is an exercise of discretion and should be affirmed unless this Court has the firm conviction that the property division was inequitable. *Id*. at 152.

Typically, the marital estate is divided between the parties, and the separate estates remain each party's separate property to take at the end of the marriage with no invasion from the other party. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). However, a party's separate estate can be invaded for redistribution when either of two statutory exceptions are met. The first exception permits invasion if, after division of the marital assets, the award to either party is insufficient for that party's suitable support and maintenance. *Id*., citing MCL 552.23. This means that the plaintiff must demonstrate *additional* need. *Id.* The second exception "is available only when the other spouse 'contributed to the acquisition, improvement, or accumulation of the property.'" *Id*. at 494-495, citing MCL 552.401.

With respect to the first exception, our review of the record indicates that plaintiff has failed to show any additional need. See *Reeves, supra*. With respect to the second exception, the trial court actually invaded defendant's emu business, a separate asset, to compensate plaintiff for her contributions to the emu business. However, the court declined to invade the Wallen property because plaintiff failed to show any contribution to the acquisition, improvement, or accumulation of the property to necessitate invasion. We are not left with the firm conviction that the dispositional ruling was inequitable.

II. Alimony Award

Plaintiff next argues that the trial court's award of rehabilitative spousal support of $600 per month for forty-eight months is inequitable because it will require her to live in an impoverished state.

Principles similar to those of property distribution apply in determining whether to award alimony. *Hanaway v Hanaway*, 208 Mich App 278, 295; 527 NW2d 792 (1995). The main objective of alimony is to balance the incomes and needs of the parties in a way that would not impoverish either party. *Id*.

Plaintiff argues that she is left with no residence or the ability to obtain her own residence, aside from living with her mother. She also asserts that she is left without medical insurance and her income is only $311 per month. Plaintiff argues that defendant remains in the marital home and receives $495 per week from his pension for the remainder of his life. Plaintiff maintains that defendant could afford to either give her an additional $100 per month or pay her alimony until she reached the age of sixty-two years.

The lower court record indicates that plaintiff receives $911 per month, the total sum of the $600 per month alimony award and $311 in earnings. Defendant's monthly income is $1,980 per month. When the alimony award is subtracted, his income is $1,380, which is subject to taxes. The evidence indicates that the Wallen property was in debt and the emu business was not reaping any profit. Under the judgment of divorce, defendant was liable for those debts. Further, the evidence indicated that plaintiff owns a house from a previous marriage. Although plaintiff testified that the house sustained wiring damages as a result of a fire, it is clear that plaintiff owns property that can be used as a residence. The court granted plaintiff the alimony award for a period of forty-eight months, based on the finding that plaintiff could obtain gainful employment either as a waitress or as a caregiver for the elderly. We conclude that the court properly balanced the incomes and needs of the parties and that the award of was just and reasonable under the circumstances of this case and was equitable.

Plaintiff also argues that the trial court's intention was to make the award of rehabilitative spousal support nonmodifiable at the end of forty-eight months. We do not read from the language of the award that the trial court precluded plaintiff from requesting a modification of the spousal support at the end of the forty-eight months. We conclude that the alimony was fair and equitable in light of the facts.

III. Attorney Fees

Plaintiff next argues that the trial court abused its discretion by awarding her only five-hundred dollars in attorney fees. We disagree.

This Court reviews an award of attorney fees for abuse of discretion. *Gates v Gates*, 256 Mich App 420, 437-438; 664 NW2d 231 (2003). An abuse of discretion occurs only if the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Id.*, quoting *Fletcher v Fletcher*, 447 Mich 871, 879-880; 526 NW2d 889 (1994). MCR 3.206(C) allows for the award of attorney fees provided that a party who requests attorney fees and expenses "must allege facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay." Attorney fees may also be awarded when a party has been forced to incur additional expenses as a result of the other party's unreasonable conduct in the course of action. *Hanaway*, *supra* at 298.

The trial court awarded plaintiff $500 in attorney fees in a pretrial motion. During trial, plaintiff again requested attorney fees, arguing that defendant had repeatedly failed to comply with plaintiff's discovery requests throughout the proceedings and that defendant knowingly concealed certain appraisals and assets. Plaintiff also argued that she was unable to pay attorney fees. At trial, the parties heatedly disputed whether defendant impeded the discovery process, and plaintiff presented evidence of her earnings and income. Plaintiff asserts on appeal that the

judgment of divorce granted her trial attorney a lien on all of the property which was awarded to her.[2] In its written opinion, the court found that each party was responsible for its own attorney fees. The court determined that plaintiff had three attorneys during the course of the proceedings, and that two years after the complaint was filed and "long after" discovery was to be completed, plaintiff began to make requests for discovery through her new attorney. The court rejected plaintiff's claim that the defense deceived or impeded discovery. We conclude that the court did not abuse its discretion in denying plaintiff's request for additional attorney fees, particularly in light of the evidence and the credibility determinations that were before it.

Plaintiff also argues that this Court should find that she is also entitled to her appellate fees and costs. The same standards apply to a grant of attorney fees and cost on appeal. See *Gates, supra* at 420. For the above reasons, we conclude that plaintiff is not entitled to fees and costs on appeal.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[2] We note that the judgment of divorce indicates that the trial court merely effected the retainer agreement signed by plaintiff when she hired the services of her trial attorney.