

STATE OF MICHIGAN
COURT OF APPEALS

TRICIA ANN DELONG,
Plaintiff-Appellee,

UNPUBLISHED
August 12, 2004

v

JAMES DAVID DELONG,
Defendant-Appellant.

No. 248336
Midland Circuit Court
LC No. 01-003398-DM

Before: Murray, P.J., and Markey and O’Connell, JJ.

PER CURIAM.

Defendant appeals by right the trial court’s determination of the property division in his divorce judgment. We affirm.

Defendant raises three issues on appeal. First, defendant argues that the trial court erred when it failed to credit defendant for a \$70,000 payment he made on a 2000 tax liability. We disagree. In reviewing a property settlement in a divorce action, this Court must first review a trial court’s findings of fact for clear error. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). A finding of fact is clearly erroneous if the reviewing court, when viewing the entire record, is left with a firm and definite conviction that a mistake has been made. *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002). If the trial court’s findings of fact are not clearly erroneous, this Court reviews the dispositional ruling to determine if it “was fair and equitable in light of those facts.” *Sparks v Sparks*, 440 Mich 141, 152; 485 NW2d 893 (1992). The reviewing court should affirm the trial court’s decision unless it is “left with the firm conviction that the division was inequitable.” *Id.*

In this case, the trial court noted defendant’s payment of the 2000 tax liability in its written opinion. Specifically, the court referenced the payment in connection with certain monies defendant took for which there existed no sufficient accounting. It is clear from the context of its opinion that the court considered that these items effectively canceled each other out. This was consistent with the court’s decision to equalize the property awarded to each

party. To the extent that the court's conclusion that certain monies were unaccounted for is based on witness credibility, we defer to the court's superior ability to assess credibility. *Draggou v Draggou*, 223 Mich App 415, 429; 566 NW2d 642 (1997).¹ Accordingly, we see no abuse of discretion in the court's handling of the payment of the 2000 tax liability.

Second, defendant argues that the trial court erred in awarding plaintiff \$5,000 in attorney fees and the amount of attorney fees was not reasonable. But, defendant did not preserve the issue for review by raising it before the trial court. Issues not presented to the trial court are not preserved for review by this Court. *Vicencio v Ramirez*, 211 Mich App 501, 509; 536 NW2d 280 (1995). In any event, if the issue had been preserved for review, we conclude that the trial court did not abuse its discretion in awarding fees as a result of defendant's unreasonable conduct during the trial. *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). The trial court is in the best position to determine if a party's conduct is unreasonable. Here, there was evidence in the record that defendant fixated on an oral settlement which fell through, and was not forthcoming about the above-mentioned, unaccounted for assets. Therefore, even if the award for attorney fees had been preserved, the trial court did not abuse its discretion in awarding them. Additionally, an award of \$5,000 does not appear to us to be unreasonable considering the size of the marital estate and the large amount of money that remained unaccounted for.

Third, defendant argues the overall division of the marital estate was unfair and inequitable because the trial court erred in assigning the risk of collection of the purchase agreement for his business, Baycom, solely to defendant. We disagree.

The trial court's findings regarding the circumstances of the business sale are not clearly erroneous. Defendant alone negotiated the sale of the business, a marital asset, while the divorce was pending. Plaintiff did not know of the sale until after the fact and had no input into the terms of the agreement. The sales agreement listed a purchase price of \$750,000, which included interest. Defendant's partner paid defendant \$300,000 up front and agreed to pay the remainder in monthly installments of \$8,333. Defendant's partner personally guaranteed the payments until December of 2003. Defendant did not attempt to negotiate a security for the contract past December 2003. Based on the evidence, it was not clearly erroneous for the court to hold defendant should bear the risk of collecting the remaining payment on the purchase agreement.

We affirm.

¹ The court stated in its opinion that it "believes the plaintiff on any issue in which these parties differed in their testimony . . . [H]is testimony surrounding assets, spending and financial issues showed either an unbelievable lack of knowledge . . . or an unwillingness to face or to tell the truth."

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell