

STATE OF MICHIGAN
COURT OF APPEALS

MARY ELLEN YANICK,

Plaintiff-Appellee,

V

DUANE MICHAEL YANICK,

Defendant-Appellant.

UNPUBLISHED

November 18, 2004

No. 251253

Livingston Circuit Court

LC No. 01-031901-DM

Before: Donofrio, P.J., and Markey and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by right from the trial court's judgment of divorce. Because the trial court's findings of fact are not clearly erroneous, the trial court exercised an appropriate amount of discretion, and the disposition of the marital property was fair and equitable, we affirm, but remand this case to the trial court for correction of a clerical correction.

Defendant first asserts that the trial court made various erroneous findings of fact. We disagree. In a divorce action, this Court reviews the trial court's findings of fact for clear error. *McNamara v Horner (After Remand)*, 255 Mich App 667, 669; 662 NW2d 436 (2003). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* In the instant case, we are not left with a definite and firm conviction that mistakes were made because each of the trial court's findings were supported by some evidence.

Defendant argues in particular that the trial court erred when it made inferences resulting from defendant's refusal to answer certain questions on the grounds that he might incriminate himself. The privilege against self-incrimination can be used during a civil trial where a party's answers might incriminate him in a future criminal proceeding. *Phillips v Deihm*, 213 Mich App 389, 399-400; 541 NW2d 566 (1995). "However, the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the amendment does not preclude the inference where the privilege is claimed by a party to civil cause." *Id.*, 400. Hence, the trial court did not err when it made inferences based on plaintiff's affirmative testimony that went unanswered by defendant.

Defendant next asserts that the trial court's disposition of marital property was inequitable because it placed a disproportional amount of weight on defendant's fault. We disagree. Again, this Court first reviews the trial court's findings of fact for clear error. *McNamara (After Remand)*, *supra*, 255 Mich App 669. If the findings of fact are upheld, this

Court then decides whether, in light of those facts, the disposition was fair and equitable. *Id.*, 670. “A dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable.” *Id.*

The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). “The division need not be mathematically equal, but any significant departure from congruence must be clearly explained.” *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003). To reach an equitable division, the trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each party’s station in life, each party’s earning ability, each party’s age, health and needs, fault or past misconduct, and any other equitable circumstance. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996). The determination of relevant factors will vary with the circumstances of each case, and no one factor should be given undue weight. *Sparks v Sparks*, 440 Mich 141, 158; 485 NW2d 893 (1992). The trial court must make specific findings regarding the factors it determines to be relevant. *Id.*, 159.

Defendant argues the trial court erred in considering his actions after the filing of the divorce in determining he was at fault for the breakdown of the marriage. We agree. “In determining ‘fault’ as one of the factors to be considered when fashioning property settlements, courts are to examine ‘the conduct of the parties during the marriage.’” *Welling v Welling*, 233 Mich App 708, 711; 592 NW2d 822 (1999), quoting *Sparks, supra*, 440 Mich 157. The question concerns who was at fault for the breakdown of the marriage. *Id.* While fault is a consideration when dividing marital property, courts do not generally consider conduct that occurs *after* the breakdown of the marital relationship when determining fault. *Knowles v Knowles*, 185 Mich App 497, 499-501; 462 NW2d 777 (1990).

Although we concluded the trial court erred to the extent it considered defendant’s post-filing actions, after reviewing the record we are satisfied that the trial court had evidence before it from prior to the breakdown of the marital relationship demonstrating defendant’s fault. This evidence includes, but is not limited to evidence of defendant’s deception, of party store proceeds, and removal of money from the children’s accounts. Defendant offered conflicting testimony but the trial court specifically found his testimony to be incredible. The trial court in a divorce proceeding “has the best opportunity to view the demeanor of the witnesses and weigh their credibility.” *Stoudemire v Stoudemire*, 248 Mich App 325, 339; 639 NW2d 274 (2001). Therefore, this Court gives special deference to a trial court’s findings when based on the credibility of the witnesses. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Thus, the trial court’s finding that defendant was at fault for the breakdown of the marriage was not clearly erroneous. Additionally, it was appropriate for the trial court to consider the post-filing actions, including defendant’s refusal to contribute toward the marital expenses pursuant to court order, as other equitable circumstances.¹

¹ The trial court’s decision to award defendant the party store proceeds and make him liable for any potential tax liability on his corporation is clearly stated in the record but the judgment of
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Defendant also argues that the disposition was inequitable because the trial court erred in imposing a constructive trust over the party store proceeds. We disagree. This Court reviews equitable actions under a de novo standard, reviewing the findings of fact supporting the decision for clear error. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997). A constructive trust arises through operation of law and a finding of wrongdoing is not a prerequisite for its establishment. *Kent v Klein*, 352 Mich 652, 656-657; 91 NW2d 11 (1958). After reviewing the record, we are satisfied that the trial court was well within its equitable powers to establish the constructive trust over the proceeds earned during the marriage by both parties and used by defendant without plaintiff's knowledge or consent.

Defendant further asserts that the trial court's valuation of the proceeds was in error because it did not take into account other legitimate expenditures from the proceeds account identified during trial by defendant. We disagree. The determination of the proper time for valuation of an asset is in the trial court's discretion and is therefore reviewed for an abuse of that discretion. *Burkey v Burkey (On Reh)*, 189 Mich App 72, 76; 471 NW2d 631 (1991). We will uphold a valuation date so long as the court had a plausible reason for its decision. *Sullivan v Sullivan*, 175 Mich App 508, 510; 438 NW2d 309 (1989). While defendant ultimately presented copies of checks drawn from the account, he was unable or unwilling to produce any bank records or statements for the account. Plaintiff testified that, although some of the funds in the Branik account went to pay marital bills, she had no way of identifying the portion of the funds that came from the party store proceeds or from defendant's wholesale car job. Defendant also testified that he gave plaintiff money earned from his job for marital bills but did not know how much and did not recall if he deposited money into the Branik account other than the proceeds check. The trial court used the value of the balance of the party store proceeds at the time the \$87,678.85 remained in the account over which defendant exercised complete control. In light of the evidence available, and the credibility of that evidence, the trial court had a plausible reason for valuing the proceeds at the time the balance of the party store proceeds was clearly established. Therefore, the trial court did not err in valuing the amount in the constructive trust at \$87,678.85.

Defendant also argues that the trial court abused its discretion in imputing to him the income of a full-time wholesaler of automobiles for the determination of child support. This issue is moot. An issue is moot when an event occurs which renders it impossible for the reviewing court to fashion a remedy to the controversy. *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003). A February 20, 2004 order regarding child support, filed after the judgment of divorce, reduced defendant's support obligation based on his unemployment benefits with no imputed income. Therefore, even if the trial court initially erred in ordering that income be imputed to defendant, defendant had already been granted the relief he now seeks on appeal.

Defendant next asserts that the trial court abused its discretion in awarding plaintiff marital assets to pay her attorney fees. We disagree. In a divorce action, this Court reviews an

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divorce mistakenly makes plaintiff liable for this amount. We therefore remand this case to the trial court with instructions to correct the judgment of divorce in accordance with MCR 2.612(A) and MCR 7.208(A)(1).

award of attorney fees for abuse of discretion. *Gates, supra*, 256 Mich App 437-438. 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.*, 438. MCL 552.13 allows the circuit court to require a party “to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency.” MCR 3.206(C) allows for the award of attorney fees as follows:

- (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action.
- (2) 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.

Furthermore, this Court will also uphold an award of attorney fees 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.” *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). During this litigation, defendant refused to abide by the trial court’s order requiring him to contribute to the marital expenses and never provided bank records for his corporation’s bank account where the party store proceeds had been deposited. The use of the corporation’s bank account occupied a large portion of time and testimony during the trial. Therefore, we conclude that the trial court was within its discretion in awarding plaintiff certain marital assets to assist her in paying her attorney fees.

Finally, defendant argues that the trial court erred in not enforcing its previous orders to sell the marital home. We disagree. The record displays that the trial court awarded the marital home and its associated mortgage to plaintiff, and since defendant has provided no basis to force the sale of the marital residence, we find no error.

We remand this case to the trial court for the ministerial task of amending the judgment of divorce in accordance with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Karen M. Fort Hood