

STATE OF MICHIGAN
COURT OF APPEALS

PARIZAD JOSHI,

Plaintiff-Appellant/Cross Appellee,

v

DARIUS JOSHI,

Defendant-Appellee/Cross
Appellant.

UNPUBLISHED

November 17, 2005

No. 256425

Wayne Circuit Court

LC No. 03-306187-DM

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals and defendant cross-appeals as of right from the trial court's judgment of divorce. We affirm.

**I. PLAINTIFF'S REQUEST FOR AN EXPERT ECONOMIST AND THE TRIAL COURT'S
APPLICATION OF "*POSTEMA*"**

Plaintiff first challenges the methodology used by the trial court in determining the value of defendant's board certifications and postdoctoral residency experience. In this regard, plaintiff raises three closely intertwined issues. Specifically, plaintiff argues that: (1) the trial court erred by refusing plaintiff's request during a settlement conference to retain an expert economist, (2) defendant's board certifications are marital assets that cannot be valued without the testimony of an expert economist, and (3) to the extent that defendant's degrees are subject to an equitable division analysis under *Postema v Postema*, 189 Mich App 89; 471 NW2d 912 (1991), the trial court's award was erroneous.

Plaintiff's arguments are without merit. The foundation of plaintiff's argument that an economist was necessary to ensure an equitable division of defendant's medical degree and board certifications is the presupposition that defendant's degree and certifications are marital assets subject to division between the parties. We disagree.

A. The Expert Economist.

Generally, to preserve an issue for appellate review, the issue must be raised before and decided by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Specifically, in order to raise an issue on appeal that the trial court erred in excluding

evidence such as the testimony of an expert witness, the party must make an offer of proof showing the substance of the evidence. MRE 103(a)(2). Here, plaintiff allegedly asked the trial court while in chambers to allow her to retain an expert economist to testify regarding the value of defendant's medical degree and certifications, which the trial court allegedly denied. There is no evidence in the record of plaintiff's request to retain an expert economist, no offer of proof with respect to the substance of that expert's testimony, nor a record that the trial court has ever denied plaintiff's request. Thus, plaintiff's argument regarding the testimony of an expert economist is unpreserved. This Court reviews unpreserved evidentiary issues to determine whether there was plain error affecting plaintiff's substantial rights. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001). There are three requirements for plain error: the error (1) must have occurred, (2) be clear or obvious, and (3) affect substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Plaintiff's argument that the trial court erred by refusing her "off the record" request to retain an expert economist for trial is without merit. Based on the record (or lack thereof), it is impossible for this Court to determine whether the trial court's opinion reasonably should have been impacted by the economist's testimony. Therefore, plaintiff has failed to show plain error affecting her substantial rights.

B. The Application of *Postema* and the Trial Court's Alimony Award.

Plaintiff's arguments that *Postema* is inapplicable and that her *Postema* claim cannot be included in her spousal support award are without merit. Because no exception need be taken to a finding or decision of the trial court, MCR 2.517(A)(7), the trial court's alimony award with respect to plaintiff's contributions toward defendant's degree is preserved for appeal. However, plaintiff's argument regarding the application of *Postema* is contrary to her argument set forth in her motion for reconsideration in the trial court:

That while professional degrees are not considered actual property to be divided in a divorce, the Court may determine that the non-degreed spouse is entitled to compensation for sacrifices she made as part of a concerted family effort and/or sacrifice toward the degree.

Plaintiff, therefore, has waived the issue for appeal. See *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003) ("[a] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.")

Nevertheless, plaintiff's arguments fail on the merits. With respect to plaintiff's challenge to the trial court's alimony award based on plaintiff's contributions and sacrifices toward securing defendant's medical certifications, this Court reviews for clear error a trial court's factual findings related to an award of alimony. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Clear error exists when, after considering all the evidence, a reviewing court possesses the definite and firm conviction that the trial court erred. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). "If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts." *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). This Court should affirm the trial court's

discretionary dispositive ruling unless “the appellate court is left with the firm conviction that the division was inequitable.” *Id.* at 152.

Postema, supra, governs the equitable division of the benefits of defendant’s advanced degree. “*Fairness* dictates that a spouse who did not earn an advanced degree be compensated whenever the advanced degree is the end product of a *concerted family effort* involving mutual sacrifice and effort by both spouses.” *Postema, supra* at 94 (emphasis in original). This Court wrote:

Any valuation of a nonstudent spouse’s equitable claim involving an advanced degree involves a two-step analysis. First, an examination of the sacrifices, efforts, and contributions of the nonstudent spouse toward attainment of the degree. Second, given such sacrifices, efforts, and contributions, a determination of what remedy or means of compensation would most equitably compensate the nonstudent spouse under the facts of the case. In this regard, . . . the length of the marriage after the degree was obtained, the sources and extent of financial support given to the degree holder during the years in school, and the overall division of the parties’ marital property are all relevant considerations in valuing a nonstudent spouse’s equitable claim involving an advanced degree upon divorce. [*Postema, supra* at 105.]

Plaintiff’s argument that *Postema* is not controlling and that she has a right to share in the present value of defendant’s board certifications is without merit. Although plaintiff cites numerous cases that purport to indicate that *Postema* does not control, plaintiff fails to cite a single case decided after *Postema* in support of her assertion, and likewise fails to persuade this Court that it should deviate from the *Postema* analysis.

Defendant argues that plaintiff does not have a claim under *Postema* because defendant obtained his medical degree before marrying plaintiff. However, although plaintiff fails to cite authority specifically holding that a spouse may recover reimbursement for contributions toward the other spouse’s completion of a postdoctoral residency (or other post graduate school education and training), the pursuit of a residency or medical specialty would appear to fall within the scope of *Postema* as “part of a larger, long-range plan intended to benefit the family as a whole.” *Postema, supra* at 95. In this regard, defendant testified that he earned only one hundred dollars a month as a physician in India, but made significantly more money after moving to the United States and securing his postdoctoral residency and board certifications. Thus, this Court must now determine whether the trial court’s remedy was fair and equitable under the facts of the case, given plaintiff’s sacrifices, efforts and contributions toward defendant’s pursuit of a residency and board certifications. See *id.* at 106-107.

The trial court’s award for plaintiff’s contributions under *Postema* was not clear error. Despite procuring a medical degree in India, defendant could not practice medicine in the United States without first passing a licensing exam. The record shows that plaintiff indeed made certain sacrifices to help defendant achieve his goal of practicing medicine in the United States. Plaintiff helped defendant apply for a residency program in the United States by helping him complete and mail the forms required to apply and by researching various universities in the United States. After the parties married in March 1992, defendant studied for six months for his residency examination while plaintiff worked at an architectural firm.

Furthermore, plaintiff testified that she did not want to leave India, but believed it was her duty as defendant's wife to come with him to the United States. It is undisputed that while defendant worked, plaintiff had primary responsibility for taking care of the parties various household responsibilities, including caring for their children after 1997. See *Postema, supra* at 96 (observing that concerted family effort exists when the supporting mate helps pay for the spouse's education or family living expenses, or "other intangible, nonpecuniary efforts and contributions, such as where a spouse increases the share of the daily tasks . . . responsibilities, or other details of household and family management undertaken in order to provide the mate with the necessary time and energy" to pursue advanced education).

With respect to the factors relevant to the inquiry, the trial court found, "based on all the testimony" that plaintiff's "contributions to Dr. Joshi were not in the least bit out of the ordinary for a woman who had no job to go to, and who had no children to take care of." The court clearly stated, "I did not find at all, under any circumstances that her efforts were anything of any extraordinary nature that even if you had had a valuation expert here that she would have prevailed on that claim." It is clear from the trial court's comments that the court considered the *Postema* factors in equitably awarding plaintiff spousal support based in part on her sacrifices to better defendant's professional career. Regardless, plaintiff significantly enjoyed the benefits of the increase in defendant's salary attributable to his residency and board certifications shortly after arriving in the United States in 1993.

Postema does not require the trial court to elicit and apply an expert's mathematical formula in determining an appropriate remedy, but rather, to consider the sacrifices of the non-degreed spouse and administer a fair and equitable award. *Postema, supra* at 94. The trial court applied the appropriate analysis and reached an equitable distribution of the benefits of defendant's advanced degree. Thus, the trial court did not commit error requiring reversal by refusing plaintiff's alleged request to retain an expert economist for trial and applying the *Postema* factors in determining plaintiff's equitable share in the benefits of defendant's residency and board certifications.

II. THE TRIAL COURT'S LIMITATION OF PLAINTIFF'S PROOFS

Plaintiff also argues that the trial court erred by limiting her right to cross-examine defendant and by limiting her proofs at trial. We disagree. "The trial court has the discretion to control the questioning of witnesses, and we review its determination of the scope of cross-examination for an abuse of discretion." *Persichini v William Beaumont Hosp*, 238 Mich App 626, 632; 607 NW2d 100 (1999). "An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias." *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

Plaintiff cites numerous instances where the trial court urged plaintiff's attorney to limit his cross-examination of defendant and where the trial court sought to move the proceeding forward. However, in the end, plaintiff's attorney completed his questioning of defendant:

Mr. Corriveau [Plaintiff's Attorney]: I may have – I'm just asking my client if there is anything she wants me to ask.

* * *

Mr. Corriveau [Plaintiff's Attorney]: At this time my client believes that I have covered all the subjects that she wanted me to cover.

The Court: Very good. Thank you.

Plaintiff's attorney subsequently cross-examined defendant a second time, which ended without any prompting from the trial court. In making the above statements, plaintiff's counsel essentially admitted that he had a full opportunity to cross-examine defendant. "[A] party may not take a position in the trial court and subsequently seek redress in an appellate court on the basis of a position contrary to that taken in the trial court." *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Plaintiff has therefore waived this issue on appeal. Nevertheless, we conclude that there was no abuse of discretion by the trial court and that no relief is warranted.

Plaintiff's argument that the trial court erred by limiting her proofs also fails. Although plaintiff includes in her "questions presented" an argument that the trial court erred by "precluding plaintiff from completing her proofs in her case in chief at trial," plaintiff devotes no legal discussion to the issue. Beyond stating her position and itemizing what she believes were isolated instances of unfair treatment or snide remarks by the trial court, plaintiff offers no analysis, cases or other authority that support this claim. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Plaintiff's failure to properly address the merits of this assertion of error constitutes abandonment of the issue. *Thompson v Thompson*, 261 Mich App 353, 356; 683 NW2d 250 (2004). Therefore, we decline to address this issue.

III. THE TRIAL COURT'S SPOUSAL SUPPORT AWARD AND PROPERTY DISTRIBUTION

Plaintiff next challenges the trial court's spousal support award and property distribution. This Court reviews for clear error a trial court's factual findings related to an award of alimony. *Moore, supra; Draggoo, supra*. Similarly, 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). Generally, this Court will affirm a property distribution unless we are "left with the firm conviction that the distribution was inequitable." *Id.*

Plaintiff first argues that the trial court erred regarding her spousal support award by not finding that defendant was more at fault for the breakdown of the marriage. We disagree. "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. Spousal support should constitute a just and reasonable amount in light of the following circumstances: (1) the parties' past relations and conduct, (2) the length of the marriage, (3) the parties' abilities to work, (4) the source and amount of property awarded to the parties, (5) the ages of the parties, (6) the parties' abilities to pay alimony, (7) the parties' present situations, (8) the needs of the parties, (9) the health of the

parties, (10) the parties' prior standard of living, (11) the parties' contributions to the joint estate, (12) general principles of equity, and (13) a party's fault in causing the divorce. MCL 552.23(1); *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996); *Thames v Thames*, 191 Mich App 299, 307-308; 477 NW2d 496 (1991).

In this case, the parties' relationship struggled from the onset. Defendant testified that the first three years of marriage were "very difficult," and plaintiff testified that the relationship up until 1994 was "up and down." Defendant testified that "after we came back from India in '94, our marriage was terrible, really terrible." Furthermore, defendant and plaintiff both recalled instances of mental and physical abuse. Although plaintiff's sister provided extensive testimony regarding defendant's advances toward her, it is uncontroverted that nothing developed from defendant's proposed affair with her other than her constant rejections. Moreover, plaintiff was not aware of defendant's pursuit of her sister until near the end of the marriage.

The record indicates that the trial court considered all of this evidence in determining the parties' fault in causing the divorce. Given this evidence, this Court does not possess the definite and firm conviction that the court erred in its factual findings, or the firm conviction that the spousal support award is inequitable. See *Beason, supra*; *Sparks, supra*.

Plaintiff also argues that the trial court erred in allocating the marital debt and assets because defendant was primarily responsible for the debt. The goal of the court when apportioning a marital estate is to reach an equitable division in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). Each spouse need not receive a mathematically equal share, but significant departures from congruence must be explained clearly by the court. *Id.* at 114-115. When dividing the estate, the 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. *Id.* at 115. The significance of each of these factors will vary from case to case, and each factor need not be given equal weight where the circumstances dictate otherwise. *Id.*

With respect to the remaining property and circumstances, the trial court awarded plaintiff 50 percent of defendant's pensions and investment accounts. Plaintiff received a 2002 Acura with a net equity of \$11,000, while defendant received a Lexis with net equity totaling \$22,595. The trial court awarded defendant \$2,000 from the parties' marital-asset bank account and \$6,000 from a bank account in India. The court further awarded plaintiff \$1,000 in her TCF bank account and awarded defendant \$5,000 in his TCF bank account.

The trial court ordered that defendant assume \$56,675.82 in marital debt, and plaintiff assume \$19,000. The judgment specifically provides that "[d]efendant is paying the vast majority of the marital debt in consideration of plaintiff receiving \$12,000 in personal vehicle and bank account equity, and defendant receiving \$32,595 in personal vehicle and bank account equity and his expected bonus of approximately \$20,000 gross to be received around July 2004." Indeed, defendant testified that he incurred an additional \$40,000 in credit card debt between October 2002 and September 2003. Defendant explained, however, that the debt was incurred significantly through purchases toward the marital home, attorney fees, therapy bills for he and plaintiff, and he and plaintiff's living expenses. The judgment of divorce also indicates that the

debt assigned to defendant reflected money spent on plaintiff's attorney fees and property taxes on the marital home. Thus, we conclude that the trial court reached an equitable division of the marital estate in light of all the circumstances, and that any congruence was clearly explained. See *Byington, supra* at 114-115. The trial court did not commit clear error.

Defendant argues on cross-appeal that the trial court erred by awarding plaintiff an excessive amount of spousal support. The trial court awarded spousal support for six years: \$4,700 a month for four years, followed by \$3,500 a month for two years, indicating that the initial four-year period would be sufficient for her to obtain her law school degree. As discussed, *supra*, although plaintiff made certain sacrifices for the sake of the marriage and assisted defendant in procuring his medical residency and board certification, both parties were equally at fault for the breakdown of the marriage. Plaintiff did not work in the United States until after she filed for divorce, and was a homemaker during the marriage. For plaintiff to achieve licensure as an architect in the United States, she would have to attend school for another three or four years. Plaintiff testified that she did not attend school in the United States because they were unable to afford the tuition, and defendant told her that it would be too stressful for her to return to school because it would have interfered with her ability to maintain the home. The trial court considered all of the above evidence and methodically examined the appropriate 12 factors in reaching its result. See *Magee, supra*. Thus, we conclude that the trial court did not commit clear error in awarding spousal support.

Defendant also argues that the trial court erred as a matter of law by providing that its judgment of divorce was nonmodifiable. In *Gates v Gates*, 256 Mich App 420, 433; 664 NW2d 231 (2003), this Court held that, where an award of spousal support results from an adjudication rather than from the parties' agreement, it may not be interpreted as being nonmodifiable even if it contains a provision purporting to limit its duration. However, the judgment of divorce provides that the spousal support award is in effect as stated "until further order of the court." The judgment further contemplates that "a modification of child support to anywhere between \$1,000 to \$1,300 per month would not be sufficient basis for plaintiff to a modification of spousal support," thus indicating that the court is willing to consider requests for modification. Therefore, defendant's assertion that the judgment of divorce is nonmodifiable is erroneous. The trial court did not err in this regard.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood