STATE OF MICHIGAN

COURT OF APPEALS

JAMES LINTON,

Plaintiff-Appellee,

v

DOROTHY D. LINTON,

Defendant-Appellant.

UNPUBLISHED
November 17, 2005

No. 256651
Kent Circuit Court
LC No. 03-004652-DO

Before: Bandstra, PJ, and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals by right from the divorce judgment. We affirm in part, reverse in part, and remand.

Defendant contends that the trial court assigned incorrect values to certain contested assets and inequitably divided the marital estate. In granting a divorce, the trial court must make findings of fact and dispositional rulings. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). A trial court's findings of fact are reviewed for clear error. *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005). A finding is clearly erroneous only when we are left with the definite and firm conviction that a mistake was made. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). In divorce cases, the trial court 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 (2003). Therefore, this Court gives special deference to a court's findings when they are based on the credibility of the witnesses. *Draggoo, supra* at 429.

If the court's findings of fact are upheld, this Court must decide whether the dispositional ruling was fair and equitable in light of those facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). The dispositional ruling is discretionary and should be affirmed unless we are left with the firm conviction that the division was inequitable. *Id*. at 152.

Defendant first asserts that the trial court erred by not specifically commenting on the record regarding plaintiff's credibility. We disagree. Defendant offers no authority for this argument, and we could therefore consider the issue abandoned on appeal. *Korth v Korth*, 256 Mich App 286, 294; 662 NW2d 111 (2003). Nonetheless, we will briefly address the argument's merits.

Findings of fact are governed by MCR 2.517, which states in relevant part that "[b]rief, definite, and pertinent findings and conclusions on contested matters are sufficient, without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). Our Supreme Court has observed in the context of child custody cases that this rule does not require the trial court to recite all the evidence considered, and that the trial court's failure to mention a particular fact does not suggest that the fact was overlooked. *Fletcher v Fletcher*, 447 Mich 871, 883-884; 526 NW2d 889 (1994). We believe that this rule applies equally in the context of divorce cases. The fact that the trial court did not specifically mention plaintiff's credibility does not mean that it was overlooked. The trial court expressly said that it considered the credibility of the witnesses, of which there were only two – plaintiff and defendant. Defendant's contention in this regard is without merit.

Defendant next argues that the court erred in determining that plaintiff had made greater contributions to the marital estate than had she. We disagree. Defendant admits that plaintiff's financial contributions to the marriage were more substantial than her own. However, she asserts that the trial court failed to properly consider the non-financial contributions that she had made, and suggests that the two parties contributed equally. Defendant cites *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995), for the proposition that one spouse's non-financial contributions to the marital estate are equally as important as the other spouse's financial contributions. Although defendant is not strictly incorrect, her reliance on *Hanaway* is misplaced because she did not make non-financial contributions of the type mentioned in that case.

The evidence in the case at bar indicated not only that plaintiff had paid most of the major expenses, including taxes, insurance, and mortgage payments, but also indicated that defendant was rarely present to care for the household or contribute to the marital relationship. Specifically, plaintiff's testimony that defendant was frequently away from the marital home and was "not around to maintain the house or do anything," was completely uncontested. On these facts, we cannot say that the trial court clearly erred in concluding that plaintiff had contributed more to the marital estate than had defendant.

Defendant next contends that the trial court erred in determining that she was at fault for the breakdown of the marriage. Again, we disagree. The trial court is in the best position to determine the extent to which each party contributed to the breakdown of the marriage. *Hanaway, supra* at 297. The testimony in this case revealed that defendant had neglected the marital relationship for some time, carrying on an extramarital relationship during the final two and one-half years of marriage. The testimony also indicated that defendant and her paramour taunted and ridiculed plaintiff through several notes and telephone calls. Based on this uncontested evidence, the trial court did not clearly err in finding that defendant was at fault for the breakdown of the marriage.

Defendant's next argument is that the trial court improperly considered fault in its decision to disproportionately divide the balance of plaintiff's individual retirement account (IRA). We disagree. Although the fault of the parties is relevant to the distribution of marital property, it is only one factor to be considered. *Sparks, supra* at 159. The other factors include the duration of the marriage, the contributions of the parties to the marital estate, the age of the parties, the health of the parties, the life status of the parties, the necessities and circumstances of

the parties, the earning abilities of the parties, and general principles of equity. *Id.* at 159-160. No one factor should be given such disproportionate weight as to be dispositive. *Id*. at 163.

In the present case, the trial court considered all the *Sparks* factors, making specific findings of fact with regard to each one. The court determined that plaintiff had contributed more to the marriage than had defendant, that defendant had been at fault for the breakdown of the marital relationship, that plaintiff had suffered from high blood pressure and depression since defendant's affair began, and that plaintiff had developed concerns regarding sexually transmitted diseases, requiring periodic testing. Additionally, the trial court found that the marriage had lasted nearly fifteen years, that plaintiff and defendant were of approximately equal age, and that both parties were gainfully employed. The court concluded that the majority of the marital estate should be divided equally, but that the *Sparks* factors weighed in favor of dividing plaintiff's IRA disproportionately, granting fifty-five percent to plaintiff and forty-five percent to defendant.

Although each of the *Sparks* factors did not individually weigh in favor of plaintiff, the factors viewed as a whole supported awarding plaintiff more of his IRA. Because the trial court based its decision on more than one of the factors and adopted the 55%-to-45% division with respect to only one of the assets, we are not left with the firm conviction that the division was inequitable. *Sparks, supra* at 152.

Defendant next argues that the trial court erred in granting plaintiff credit for his $24,000 down payment on the marital home. Again, we disagree. Plaintiff testified that he had contributed $24,000, earned before the marriage, toward the down payment on the marital home. Defendant testified that she had contributed $14,400 in premarital assets of her own toward the down payment. Neither party's testimony on this matter was contested. Thus, the trial court did not err in its findings regarding those contributions or in its finding that these contributions constituted premarital assets. When a marital estate is divided, each party generally takes away any premarital assets as separate property. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). Premarital assets invested as a down payment on the purchase of real estate constitute separate property. *Id*. at 495-496. Therefore, the trial court did not err in excluding the amount of the parties' down payment from the marital estate.

Defendant's next argument concerns the value and distribution of the parties' jewelry and three motorcycles. The trial court found that the value of plaintiff's two motorcycles was roughly equivalent to the combined value of defendant's motorcycle and jewelry, so it allowed plaintiff to keep his motorcycles and defendant her motorcycle and jewelry. Defendant contends that this was inequitable because the court undervalued her jewelry and improperly included it in the marital estate. We disagree.

The testimony revealed that all but one piece of defendant's jewelry had been accumulated during the marriage. Although plaintiff initially testified that he believed the jewelry was worth $33,000, he later testified that he did not know its value. Defendant testified that she believed the jewelry was worth less than $33,000, but did not offer an estimated value of her own. Defendant later testified that plaintiff would be able to purchase half of the jewelry for $15,000. The court adopted $13,700 as the value of the jewelry.

In light of the paucity of evidence regarding the value of the jewelry, the court drew a reasonable inference, basing its determination of value on the possible range suggested by the parties. Where a trial court's valuation of a marital asset is within a range established by the proofs, no clear error is present. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). Moreover, because both parties testified that the jewelry was accumulated during the marriage, the court did not clearly err in determining that it was part of the marital estate. We note that defendant could have assisted the trial court on the issue of valuation by providing evidence of the jewelry's worth. Although both parties had ample time to conduct discovery on the value of this asset, neither did so. As we observed in *Perrin v Perrin*, 169 Mich App 18, 23; 425 NW2d 494 (1988), this Court will not reverse a trial court's valuation of an asset simply because the parties failed to present proper evidence of the asset's value.

The trial court then considered the value of the three motorcycles, finding that plaintiff's two motorcycles had a combined value of about $21,300, and that defendant's motorcycle was worth about $6,200. Although the apportionment of a marital estate should be equitable, the spouses need not receive mathematically equal shares. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). The trial court granted defendant her motorcycle and jewelry with a combined value of about $19,900, and granted plaintiff both of his motorcycles, with a combined value of $21,300. Although not mathematically equal, we are not left with the firm conviction that this division was inequitable. *Sparks, supra* at 152.

Defendant next argues that the trial court inequitably divided 834.44 shares of Sysco Corporation stock by awarding it entirely to plaintiff. We agree and remand for redistribution. The trial court included the 834.44 shares plaintiff acquired during the marriage in the marital estate, but neither party testified regarding the value of the Sysco stock. Apparently because it was unable to determine the value, the trial court granted all of the stock to plaintiff. While we agree that the stock was a marital asset, *Byington, supra*, at 110, we do not believe that the stock was fairly divided.

Certain assets, like stock, may be divided without regard to their value. Both parties agreed that the number of shares owned at the time of trial was 834.44. Therefore, the court could have equally divided the stock into two sets of 417.22 shares, or it could have divided the stock 55%-to-45%, as it did the IRA. Because the trial court inequitably awarded the entire asset to plaintiff, we remand for a redistribution of the stock.

Defendant's final contention concerns the severance package that she anticipated receiving from her employer. Defendant testified that her employer would be closing the facility where she worked within the year, but that she did not know the exact date on which her employer planned to cease operations. In exchange for a retention bonus, defendant agreed to continue working until her employer's final day of business. Defendant testified that upon losing her job, she would receive a severance package consisting of two parts: severance pay based on the number of years she had worked, and the retention bonus for remaining with her employer until it terminated its operations.

Defendant argues that the trial court erred in its valuation of her severance package. We disagree. Defendant testified that she did not know the exact value of her severance package, but she believed that the severance pay portion would be based on the number of years she had worked and a percentage of her annual salary. Based on this formula, plaintiff testified that he

believed the severance pay portion would be about $32,000. Plaintiff also testified that he believed the retention bonus would be about $8,000. On the basis of this testimony, the trial court found that the two portions of the severance package had a combined total of $40,000. Deferring to the trial court's superior ability to observe the witnesses and weigh the testimony, *Dragoo, supra*, at 429, the trial court did not clearly err in assessing this value.

Defendant next argues that even if the trial court properly assessed the value, it erred in including the entire severance package in the marital estate. We agree. The testimony indicated that the severance pay portion had been earned entirely during the marriage, based entirely on defendant's past service to her employer; however, the retention bonus would not accrue until defendant completed her final period of employment. The trial court included both portions in the marital estate. The court granted the full $40,000 severance package to defendant, but offset that amount by awarding plaintiff $40,000 in cash from the balance of his IRA.

This Court has held that severance compensation earned entirely during the marriage is a marital asset subject to equitable division on divorce. *McNamara v Horner*, 249 Mich App 177, 187-188; 642 NW2d 385 (2002). Because defendant's $32,000 severance pay had already been earned during the marriage, the trial court did not err by including it in the marital estate. But, unlike the severance pay, defendant had not yet earned the retention bonus, so it was not accumulated during the marriage. *Id*. By including defendant's $8,000 retention bonus in the marital estate, the trial court erred so we remand for exclusion of defendant's $8,000 retention bonus from the marital estate. On remand, the trial court shall reduce the value of plaintiff's $40,000 cash setoff to $32,000 and equitably divide the $8,000 difference.[1]

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[1] Defendant allegedly learned after the judgment was entered in this case that she would not be losing her job and would not receive any severance or retention pay. Defendant filed a post-judgment motion to reopen the divorce and amend the judgment, but provided no documentary evidence in support of the motion. The trial court denied defendant's motion. The denial of such a motion is reviewed for an abuse of discretion. *Mixon v Mixon*, 237 Mich App 159, 163; 602 NW2d 406 (1999).

Defendant's motion asserted that her circumstances with respect to the once-anticipated severance package had changed; however, defendant presented no evidence to substantiate this claim. Post-judgment motions to amend, when based on a change in circumstances or newly discovered evidence, must be accompanied by supporting affidavits. MCR 2.611(D)(1). In addition, it is not an abuse of discretion for a trial court to deny a post-judgment motion to amend when there is no indication that the motion is meritorious. *Cowan v Anderson*, 184 Mich 649, 656; 151 NW 608 (1915). Because defendant presented no affidavit or other documentary evidence to corroborate her assertion, the trial court did not abuse its discretion in denying defendant's motion.

We affirm in part, reverse in part, and remand. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Jane E. Markey