STATE OF MICHIGAN

COURT OF APPEALS

CATHY SKRIPNIK, Plaintiff-Appellee,	UNPUBLISHED December 18, 2007
v	No. 272017 Kent Circuit Court Family Division
IVAN SKRIPNIK, Defendant-Appellant.	LC No. 04-009549-DO

Before: Bandstra, P.J., and Meter and Beckering, JJ.

PER CURIAM.

In this property division dispute attendant to the parties' divorce, defendant appeals as of right from the trial court's July 7, 2006 judgment. Defendant claims that the trial court erred by awarding plaintiff 55 percent of the marital estate, by including his premarital pension in the marital estate, by awarding plaintiff allegedly excessive spousal support, and by failing to admit his spousal-support prognosticator reports into evidence. We affirm in part, vacate in part, and remand for further proceedings.

The parties were married on January 10, 1980, and plaintiff filed for divorce on September 30, 2004. The parties first met in 1974 while working for General Motors Corporation (GM). In 1985, after the birth of the parties' second child, plaintiff resigned from GM and became a fulltime homemaker. Since 1990, plaintiff has also worked as a seasonal tax preparer. She makes approximately $15,000 a year, including unemployment compensation. Between 1999 and 2004, plaintiff suffered severe health problems. She is currently in better health but continues to have high medical expenses. Defendant has continued to work for GM since he started in 1974. During the parties' marriage, defendant earned a bachelor's degree and a master's degree. He anticipated making $133,000 in 2006. The trial court found that defendant engaged in an extramarital affair before plaintiff filed for divorce and that the affair was the primary reason for the breakdown of the parties' marriage. Accordingly, the trial court awarded 55 percent of the marital estate to plaintiff and 45 percent to defendant. The trial court awarded plaintiff spousal support in the amount of $5,196 per month and included the entirety of both parties' GM pensions in the marital estate.

We review findings of fact made in relation to a division of marital property for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the firm

conviction that a mistake has been made." *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002). The trial court's dispositional ruling is discretionary and will be affirmed unless we are left with the firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

Defendant argues that the trial court abused its discretion by awarding him less than 50 percent of the marital estate. 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*, *supra* at 188. The division need not be mathematically equal, but the trial court must clearly explain any significant departure from congruence. *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, earning ability, age, health, and needs, fault or past misconduct, and any other equitable circumstance. *Sparks*, *supra* at 158-160. The trial court must make specific findings regarding the factors it determines to be relevant. *Id*. at 159.

Defendant argues that the trial court erred in finding that he engaged in an extramarital affair before plaintiff filed for divorce and in considering this erroneous conclusion in dividing the marital estate. We disagree. Plaintiff first suspected defendant of engaging in an extra-marital affair in January 2004. That spring, defendant bought new underwear and clothing and stayed out of the house all night on more than one occasion, and plaintiff once found women's eye cream in his overnight bag. Defendant also made numerous telephone calls to a female coworker, Terren Bonkowski. In June 2004, defendant admitted having an affair with Bonkowski and then refused to participate in marriage counseling. Currently, defendant is dating Bonkowski and the two reside together. Although defendant and Bonkowski testified that their affair did not begin until after plaintiff filed for divorce, we accord special deference to a trial court's factual findings when based on the credibility of the witnesses. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). The trial court's findings regarding defendant's affair cannot be deemed clear error. See *McNamara*, *supra* at 182-183. Furthermore, the trial court properly considered evidence of defendant's affair in distributing the marital estate. As stated in *Hanaway v Hanaway*, 208 Mich App 278, 297; 527 NW2d 792 (1995):

> The relative value to be given the fault element in a particular case and the extent to which particular actions are regarded as fault contributing to the breakdown of a marriage are issues calling for a subjective response; such matters are left to the trial court's discretion subject to the requirement that the distribution not be inequitable. The trial court is in the best position to determine the extent to which each party's activities contributed to the breakdown of the marriage.

The trial court properly considered all of the factors relevant to the distribution of marital assets, including the plaintiff's current financial situation and earning ability, her health, and the issue of fault, and reached an equitable division of the marital estate.

Defendant next argues that the trial court erred in including the premarital portion of his GM pension in the marital estate. Generally, any right to vested pension benefits accrued by a party during the marriage must be considered part of the marital estate subject to division upon divorce. MCL 552.18(1); *Pickering v Pickering*, 268 Mich App 1, 7-8; 706 NW2d 835 (2005). Pension benefits acquired before or after the marriage may also be included in the marital estate

if one of two statutorily-created exceptions exists. See *Bachran v Bachran*, 467 Mich 888, 888; 653 NW2d 405 (2002), and *Reeves v Reeves*, 226 Mich App 490, 494-495; 575 NW2d 1 (1997). MCL 552.23(1) permits the trial court to invade a spouse's separate property when "the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party . . . ." *Reeves*, *supra* at 494. In other words, "invasion is allowed when one party demonstrates additional need." *Id*. The second exception, MCL 552.401, permits the trial court to invade a spouse's separate property when the other spouse "contributed to the acquisition, improvement, or accumulation of the property." *Reeves*, *supra* at 494-495.

The court stated the following with regard to the issue:

> The parties were both employed by [GM] at the time of their marriage and had approximately one month's difference in their seniority at that time. Throughout the substantial length of their marriage, the parties conducted their financial activities as a partnership with each contributing to the accumulation and maintenance of the marital estate in conformance with the roles and responsibilities upon which they mutually agreed.
>
> The distribution of the pre-marital portion of both pensions as part of the marital estate is the only just and equitable resolution of the property distribution. Therefore, the provision as previously set forth regarding the distribution of the parties' [GM] pension benefits includes all pension benefits accumulated by both parties both before and during the marriage.

The court did not adequately analyze the separate property under the principles of *Reeves*. See *Bachran*, *supra* at 888. Accordingly, we vacate that part of the pension award relating to premarital assets in order for the trial court to consider the *Reeves* principles and to modify, if necessary, its division of the separate property.

Defendant next argues that the trial court's award of spousal support was excessive under the circumstances. An award of spousal support is in the trial court's discretion. *Gates*, *supra* at 432. "The main objective of [spousal support] is to balance the incomes and needs of the parties in a way that will not impoverish either party," and spousal support "is to be based on what is just and reasonable under the circumstances of the case." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). In awarding spousal support, the trial court should consider

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay [spousal support], (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).]

In this case, the trial court specifically addressed the factors relevant to an award of spousal support. See *id*. The trial court found that after 24 years of marriage, defendant engaged

in an extramarital affair leading to the breakdown of the marriage. The trial court further noted that plaintiff's assets are insufficient to maintain "anything akin to the lifestyle enjoyed by the parties during the marriage." Defendant's income is roughly ten times that of plaintiff's. Moreover, as the trial court indicated, while plaintiff raised the parties' children and maintained the marital home, her employment skills and education grew obsolete, except in the limited area of tax preparation. Now in her mid-50s, she is disadvantaged in the job market. She also suffered serious health problems that could hamper her ability to work fulltime. Currently, plaintiff pays all of her own living expenses, including medical insurance. On the other hand, defendant continued to upgrade his education and expertise in his field during the parties' marriage. Currently, defendant's employer pays his medical insurance and defendant's girlfriend allows him to live with her without paying rent or utility bills. In light of this evidence, we find that the trial court's award of spousal support was just and equitable.

Defendant finally argues that the trial court erred by refusing to admit his spousal support prognosticator reports into evidence. The trial court found that the prognosticator reports constituted inadmissible hearsay. We review a trial court's ruling regarding the admission or exclusion of evidence for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 160; 693 NW2d 825 (2005). Preliminary issues of law, such as the construction of evidentiary rules, are subject to de novo review on appeal. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

We find, based on the plain language of MRE 801, that the trial court erred as a matter of law in excluding defendant's spousal-support prognosticator reports as hearsay. The crucial question here is whether the results of a software program analyzing data are hearsay. "Hearsay" is defined in MRE 801(c) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "declarant" is "a person who makes a statement," MRE 801(b), and a "statement" is "an oral or written assertion" or "nonverbal conduct of a person . . . intended as an assertion," MRE 801(a). Courts from other jurisdictions have ruled that machine-generated or computer-generated information, as opposed to printouts of information entered into a computer by a person, is not hearsay because a machine is not a declarant. See, e.g., *Oregon v Weber*, 172 Ore App 704, 708-709; 19 P3d 378 (2001); *Stevenson v Texas*, 920 SW2d 342, 343-344 (Tex App, 1996). See also 2 Robinson, Longhofer & Ankers, Michigan Court Rules Practice, Evidence, § 801.3, p 10 ("When . . . a 'fact' is 'asserted' by a non-human entity, such as a clock 'telling the time' or a tracking dog following a scent, the 'statement' is not hearsay because the 'declarant' is not a 'person.'"). Because computer-generated information falls outside the plain language of the statute, the trial court erred in excluding defendant's spousal-support prognosticator reports as hearsay. See *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005) (stating that statutory language is given its plain, ordinary meaning and, if the language is unambiguous, further construction is neither required nor permitted).

That said, however, defendant has not established that the trial court committed error *requiring reversal* in excluding the evidence. Error warranting reversal may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a); *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). Thus, reversal is warranted only if it affirmatively appears, after review of the entire record, that it is more probable than not that the court's error was outcome-determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d

607 (1999). An award of spousal support is discretionary, *Gates*, *supra* at 432, and the factors to be considered in granting spousal support are well-established in case law. Considering that the trial court properly weighed all the relevant factors in awarding plaintiff spousal support, defendant cannot establish that it is more probable than not that the exclusion of the spousal-support prognosticator reports was outcome-determinative. This issue does not warrant reversal.

Affirmed in part, vacated in part, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Patrick M. Meter
/s/ Jane M. Beckering