

STATE OF MICHIGAN
COURT OF APPEALS

DIXIE LEE ANDERSON,

Plaintiff-Appellant/Cross-Appellee,

v

DOYLE ANTHONY HAYES, SR.,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

July 1, 2008

No. 273914

Kent Circuit Court

LC No. 273914

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

In this divorce action, plaintiff appeals as of right from a judgment of divorce and defendant cross appeals. On direct appeal, plaintiff challenges the award of spousal support, the division of property, and the failure of the trial court to award her attorney fees. On cross appeal, all of defendant's issues concerns the valuation of the parties' business asset, Pyper Products. We affirm in part, vacate in part, and remand.

I

The parties were married on September 30, 1989 when each was approximately 39 years old. Each party was previously married and this marriage produced no children. At the time of the marriage, plaintiff, an MBA, was doing consulting work out of her home. At the time of the marriage, defendant, an executive, had been employed at General Motors but was transitioning to Diesel Technologies. After they were married, defendant moved into plaintiff's house on Byron Street in the Easttown section of Grand Rapids, Michigan. Initially, the parties lived a very modest lifestyle because plaintiff's income from her private consulting was small and defendant had spousal and child support obligations as a result of his previous divorce. The parties grew more financially stable and purchased a cottage in Pentwater, Michigan in 1992.

Five years into their marriage defendant became unhappy with his job and began interviewing, but instead decided he wanted to start his own company. To prepare for the start-up of the business, reduce their liabilities and increase their chances of obtaining financing, the parties sold their Pentwater cottage for a \$4,000 profit. They then took out a \$111,000 loan to secure the necessary start-up capital. Together with plaintiff's encouragement, defendant formed Pyper Products Corporation (Pyper Products) on December 14, 1994 with several other corporate entities. Pyper Products was organized as a Minority Business Enterprise (MBE) in Michigan

based on defendant's African-American race. To satisfy the MBE requirements all corporate constituents granted defendant 55% of the stock in the company. Pyper Products is located in Battle Creek and manufactures plastic automotive parts including fans and fan shrouds.

In 1995, plaintiff became employed with the World Affairs Council of Western Michigan, and, at the time of the divorce, she was the Executive Director of the Council. In 1996, the parties sold the house on Byron Street and used the \$50,000 profit on the sale as a down payment on a new home on Robinson Road in Grand Rapids, Michigan. The parties financed the remainder of the purchase price through a \$120,000 mortgage. Later, in 1998, the parties refinanced the primary mortgage increasing it to \$150,000. The parties also opened a home equity line of credit on the house, which at the time of the divorce, amounted to nearly \$66,000. The parties used the line of credit to make home repairs, purchase an automobile, and finance various other expenses.

Over time, the parties began to have arguments over finances and personal disagreements. In July 2000, defendant began having an extramarital affair. In 2003, defendant and other parties and entities began a staffing company called Talent Trax, LLC. Defendant was credited with a 40% interest in Talent Trax, LLC. In order to finance defendant's capital contribution, a second line of credit was established on the parties' home on Robinson Road in the amount of \$10,000. In early 2003, plaintiff began to suspect that defendant was having affairs and had a gambling problem. Plaintiff confronted defendant and he agreed to attend Gamblers Anonymous meetings. By October 2003 plaintiff suspected defendant was not attending his meetings and hired a private detective to follow defendant.

Plaintiff filed for divorce on March 25, 2004 after nearly fifteen years of marriage. After lengthy divorce proceedings, the parties were divorced on October 4, 2006. After hearing testimony in the matter, the trial court made the following findings of fact on the record:

This is a marriage of approximately fifteen years. The parties were married in September of 1989. The past relations and conduct of the parties have been testified to at length. Both parties work. As the record indicates, [plaintiff] is the executive director of the World Affairs Counsel where she earns approximately \$50,000.00 per year.

And, [defendant] is the head of Pyper Products, where he earns \$150,000.00, approximately. He also earns funds from Talent Trax, and funds as a bank director for Mercantile Bank, for an approximate yearly wage of somewhere between \$185,000.00 to \$200,000.00 per year.

Both parties have the ability to work, and continue to be employed throughout the pendency of these proceedings.

The Court in its discretion with regard to spousal support has considered the significant asset of Pyper Products in the award that I've just stated that will be made to [plaintiff.]

Both parties are approximately 55 years of age. The Court does find that [defendant] has the ability to pay spousal support based upon his significant income being much more than [plaintiff's.]

Currently, as the Court evaluates the present situation of the parties, both parties have independent living situations. Again, both parties are employed. And, both parties have presented budgets to the Court that are included in the file.

The needs of the parties, as I've indicated, are set forth on their respective budgets. Neither parties' needs are significantly higher than the others. The parties each enjoy relatively fine health. The prior standard of living of the parties and whether either is responsible for the support of the other.

The parties lived a relatively middle class lifestyle until [defendant] moved in – into his position with Pyper Products. And, then their income significantly increased. He's been the primary wage earner during the marriage of the parties.

Both have contributed to the joint estate. And, the Court does find with regard to fault, that [defendant] is responsible for the end of this marriage, based on multiple affairs, and based on a lack of honesty – honesty, and also with regard to financial difficulties including gambling.

Pointing to its conclusions that both parties contributed to the marriage and that defendant was responsible for the end of this marriage, based on marital infidelity, a lack of honesty, and financial difficulties including gambling, the trial court granted plaintiff 55% of the parties' non-business marital assets and 45% of the parties' non-business marital assets to defendant. When distributing the non-business marital assets, the trial court utilized a spreadsheet submitted by defendant proposing a division of assets and liabilities as a starting point. The trial court allocated individual assets and liabilities based in its findings of fact regarding valuation. The trial court specifically assigned values to the parties' real property, retirement assets, stock options and deferred compensation, bank accounts, vehicles, and debts. Once allocated, in order to balance the property settlement at 55% to plaintiff and 45% to defendant, the trial court ordered defendant to pay plaintiff the sum of \$24,727 in cash from a premarital IRA.

The trial court also granted plaintiff spousal support in the amount of \$2,000 per month for a period of three years to assist her in a transition to living solely on her own funds after concluding that defendant had "the ability to pay spousal support based upon his significant income being much more than [plaintiff's.]" At the time of the divorce, the trial court found that defendant's aggregate yearly income was approximately \$185,000 to \$200,000 and plaintiff's annual income was approximately \$50,000. The trial court conditioned the spousal support on cohabitation, death, or remarriage, and support was made effective November 1, 2005.

The trial court granted plaintiff and defendant both 50% of the parties' business assets. The trial court heard extensive testimony about the valuation of Pyper Products. Plaintiff's expert, Marc Gilbert, testified that Pyper Products should be valued at \$4.5 million. Defendant's expert, Eric Adamy, testified that Pyper Products had no value in excess of its substantial debts.

Plaintiff then presented rebuttal testimony through another expert, Christine Baker, who criticized Adamy's methodology and testified that in her opinion, \$3,269,000 represented the equity value of Pyper Products. The trial court adopted Baker's testimony with respect to the equity value of Pyper Products. The trial court subtracted marital debt associated with Pyper Products and then determined that defendant's 55% interest in the business was \$1,712,259. The trial court divided the amount equally and awarded plaintiff 50% totaling \$856,000. In regard to Talent Trax, LLC, the trial court credited Adamy's valuation and found its worth was \$35,000. Again, the trial court subtracted the marital debt associated with the asset, determined that defendant's interest was 40% totaling \$4,500, and granted plaintiff 50% in the amount of \$2,250.

The trial court invited the parties to submit proposals regarding how the business asset awards would be paid to plaintiff. The trial court heard testimony, but was unsatisfied with the parties proposed payment terms. The trial court stated that plaintiff's expert merely presented an alternative redistribution of the entire marital estate. Defendant's expert maintained that based on his projections, it would take the business eleven years to pay its debts and be in a position to pay defendant any additional sums from which he could start to pay plaintiff her 50% share. Thus defendant sought an eleven-year deferment on paying plaintiff her share. Finding the parties' payment proposals unhelpful, but the valuation fair, the trial court fashioned a payment plan. The trial court directed that defendant would pay plaintiff \$4,000 per month until the satisfaction of the debt commencing at termination of defendant's spousal support obligation to plaintiff. The trial court also set a 7% interest rate on the award to encourage defendant's early payment. The trial court mandated a review at eleven years based on Adamy's testimony about the future of Pyper Products but also suggested reviews at three year intervals.

Plaintiff's appeal and defendant's cross-appeal followed.

II

"In deciding a divorce action, the circuit court must make findings of fact and dispositional rulings." *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996). The appellate standard of review for matters of property distribution is twofold. First, this Court must review the trial court's findings of fact for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding is clearly erroneous if the appellate court, on all of the evidence, is left with a definite and firm conviction that a mistake has been made. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). We give special deference to a trial court's findings when they are based on the credibility of the witnesses. *Id.* Second, if the trial court's findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts. *Sparks, supra* at 151-152. "The court's dispositional ruling should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005).

III

Plaintiff first argues that the trial court's alimony/spousal support award was unjust and unreasonable under the facts and circumstances of the case. Defendant responds that the trial court properly awarded plaintiff spousal support in the amount of \$2,000 per month for three years because plaintiff's own testimony provided a sufficient basis for the award. We review a trial court's award of spousal support for an abuse of discretion. *Olson v Olson*, 256 Mich App

619, 631; 671 NW2d 64 (2003). An abuse of discretion occurs when the trial court's decision falls outside of the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). We review a trial court's findings of fact related to spousal support for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). Again, "[a] finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made." *Id.* at 654-655. If there is no clear error, we determine whether the dispositional ruling was fair and equitable in light of the facts. *Id.* at 655.

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. *Moore, supra* at 654. Support is to be based on what is just and reasonable under the circumstances of the case. *Id.* The trial court should consider: (1) the relations and conduct of the parties during the marriage; (2) the length of the marriage; (3) the parties' ability to work; (4) the distribution of property awarded to the parties; (5) the parties' ages; (6) the abilities of the parties to pay support; (7) the present situation of the parties; (8) the parties' needs; (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, supra* at 631. When determining spousal support, the trial court "should focus on the income-earning potential of the assets and should not evaluate a party's ability to provide self-support by including in the amount available for support the value of the assets themselves." *Hanaway v Hanaway*, 208 Mich App 278, 296; 527 NW2d 792 (1995).

In this case, both parties submitted a statement of their respective expenses and income for the court's consideration, and the trial court specifically addressed the *Olson, supra* factors relevant to an award of spousal support. The trial court considered the parties' ages, health, employment, past relations, and contributions to the marriage. The trial court recognized that the parties previously enjoyed a "middle class" standard of living. The trial court found that defendant was at fault for the divorce because of issues related to honesty, gambling, and infidelity. While noting that it had awarded plaintiff 50% of the parties' equity in Pyper Products in the amount of \$856,000, it also awarded plaintiff spousal support in the amount of \$2,000 per month for three years stating as follows:

Based on review of the factors, the Court does not find that this is a strong spousal support case.

The Court will allocate spousal support to [plaintiff] for approximately three years at \$2,000.00 per month. This will, hopefully, assist in her transition to rely on her own funds, and based upon the amounts to be paid based on her interest in Pyper Products.

Despite plaintiff's argument to the contrary, the trial court considered the disparity between plaintiff's and defendant's annual salaries and further acknowledged defendant's ability to pay spousal support when it determined that plaintiff was entitled to rehabilitative spousal support. While plaintiff places significant emphasis on one or two of the factors to be considered in awarding spousal support, and plainly, the court found defendant responsible for the breakdown of the marriage, fault is only one of the relevant factors in determining spousal support. "A judge's role is to achieve equity, not to 'punish' one of the parties." *Sands v Sands*,

442 Mich 30, 36-37; 497 NW2d 493 (1993). In light of the evidence and how it relates to the factors as a whole, we conclude that the trial court's award of spousal support was just and equitable because it balanced the needs and equities of the parties.

In the context of this issue plaintiff also asserts that potential tax consequences may decrease the amount of her monthly spousal support award. This issue was not raised in the trial court and plaintiff presented no evidence in the trial court regarding a potential tax effect. Thus, on appeal, plaintiff has attempted to improperly expand the record to establish her assertion. As such, we may not consider this evidence and decline to review this issue. This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal. *Reeves v Kmart Corp*, 229 Mich App 466, 481 n 7; 582 NW2d 841 (1998).

IV

Plaintiff next argues that the trial court's property settlement lacked congruence and imposed an economic hardship on plaintiff. A judgment of divorce must include a determination of the property rights of the divorcing parties. MCR 3.211(B)(3); *Olson, supra* at 627. The trial court's goal in distributing the marital estate is to reach an equitable distribution of the property in light of all the circumstances. *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003). To reach an equitable distribution, a trial court should consider nine factors:

- (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. [*Sparks, supra* at 159-160.]

Plaintiff advances six separate arguments in support of her assertion that the trial court's property settlement lacked congruence and imposed an economic hardship on plaintiff. We address each argument in kind.

A.

Plaintiff first assigns fault to the trial court's award of the marital home and associated mortgages to her. Plaintiff states that the trial court award effectively left her, a 57-year-old woman, with two mortgages to be refinanced, taxes, insurance, and maintenance amounting to a "huge economic headache" in a depressed real estate market. Defendant responds that the trial court awarded plaintiff the parties' "single most valuable non-business asset, the marital home" and states that plaintiff's complaints about refinancing are "absurd." Regarding the taxes, insurance, and maintenance costs associated with the marital home award, defendant contends that those claims must be automatically rejected because plaintiff did not present any evidence regarding those issues during the trial.

"In dividing marital assets, the goal is to reach an equitable division in light of all the circumstances." *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). The division of property is not governed by a rigid set of rules and the determination of relevant factors will vary with the facts and circumstances of each case. *Sands, supra* at 34. Here, the record reveals that the trial court clearly considered the *Sparks* factors when it distributed the

marital estate and awarded plaintiff a disproportionate 55%. In fact, the record reveals that the trial court engaged in a painstaking exercise to reach an equitable distribution of the parties' marital assets and liabilities including the parties' marital home to which plaintiff now assigns error for the first time on appeal.

Plaintiff relies only on her own unsubstantiated assertions regarding the “economic travesty” that the trial court’s award of the marital home and associated mortgages has caused her post-judgment of divorce. To establish error, plaintiff points only to the two mortgages on the house, taxes, insurance, and required maintenance costs and asks this Court to “empathize with [her] fear.” Plaintiff also states that she could sell the property but “[a] sale would also be subject to paying repair costs and a real estate commission, and in the present market, it is doubtful that there is any value at all in this asset.” Again, plaintiff has improperly attempted to expand the record on appeal to establish her assertions. As such, we may not consider this evidence and decline to review this issue. This Court’s review is limited to the record established by the trial court, and a party may not expand the record on appeal. *Reeves, supra* at 481 n 7.

We find no error in the trial court’s ruling. The record shows that the trial court valued the house at \$260,000 and was subject to a primary mortgage in the amount of \$136,887 and a second mortgage in the amount of \$66,000. Thus, the trial court credited plaintiff with equity in the home in the amount of \$57,113. In her brief on appeal, plaintiff does not challenge the trial court’s valuation of the property. In fact, plaintiff does not even assert that the trial court’s findings of fact regarding valuation of the marital home at the time of the divorce were error. In any event, plaintiff has failed to show that the trial court’s dispositive ruling regarding the marital home was not fair and equitable in light of the facts of the case. *Sparks, supra* at 151-152. And for these reasons we would not disturb the trial court’s dispositional ruling regarding the marital home. *Pickering, supra* at 7.

B.

Next, plaintiff argues that the trial court erred when it did not include the value of Pyper Products in its calculation of the aggregate value of the parties’ asset/debt schedule. Defendant responds that the trial court properly considered the value of the business asset, Pyper Products, but did so separately from the parties’ non-business assets that were included on the asset/debt schedule. Our review of the record reveals that plaintiff’s argument is without merit. The record is plain that the trial court considered the parties’ business and non-business assets and liabilities separately only as a matter of mathematical convenience because it used different distribution factors, i.e., the trial court awarded plaintiff 55% of the non-business assets but only 50% of the business assets including the value of Pyper Products. Indeed, the trial court awarded plaintiff 50% of the value Pyper Products in the amount of \$856,000. Plaintiff has not shown error.

C.

Plaintiff asserts that the trial court erred when it did not consider \$43,462 in credit card debt as defendant’s obligation totally and completely separate from the parties’ marital debts. Plaintiff argues in particular that these debts should not be credited against defendant’s portion of the marital assets because the record displays that defendant accumulated these debts through his own financial malfeasance, gambling, and financing of extramarital affairs. In response,

defendant argues that the debts were incurred on the parties' credit cards during the marriage and are subject to distribution along with the marital estate. Defendant further asserts that questions of credibility are for the trial court and the trial court clearly did not find that these debts were defendant's separate debts outside of the marital estate.

In a divorce action, before attempting to divide the parties' property, the court must first decide which assets are marital and which are separate. *Reeves v Reeves*, 226 Mich App 490, 493; 575 NW2d 1 (1997). It is generally presumed that all debt accumulated during the marriage is marital. *Lesko v Lesko*, 184 Mich App 395, 401; 457 NW2d 695 (1990), overruled on other grounds *Booth v Booth*, 194 Mich App 284 (1992). In *Lesko, supra* at 401, this Court recognized that trial courts have the power to determine whether debts are joint debts or are the individual responsibility of one party and, if so, to assign them to the party who incurred the debt.

The record reveals that the trial court considered all of the parties' credit card debt to be joint debts and allocated the parties' credit card debt between the parties as part of the non-business property allocation. The trial court assigned only one credit card debt to plaintiff: Providian Credit Card in the amount of \$7,829. The trial court assigned the following three credit card debts totaling \$43,462 to defendant: MBNA debt (formerly First Air) in the amount of \$8,775; MBNA debt (formerly Sears) in the amount of \$14,426; and Chase Revolving Credit (formerly Huntington) in the amount of \$20,261. The trial court also assigned the parties' Mobil/Exxon credit card debt to defendant in the amount of \$2,423.

Plaintiff assigns error to the three credit card debts incurred totaling \$43,462 during the marriage. She states in her brief on appeal that these debts were incurred solely by defendant as the direct result of his "personal malfeasance, gambling, and systematic patterns of withdrawals from ATM accounts and dealing with credit card debt, which financed his extramarital affairs." Thus, plaintiff contends that the \$43,462 in credit card debt should not be considered joint debt and the trial court clearly erred when it distributed the debt as part of the marital estate. To support her assertions plaintiff points only to her own self-serving trial testimony outlining her description of defendant's activities. But plaintiff admits that the credit card debt was incurred during the marriage on the parties' credit cards.

Importantly, the trial court's finding that the challenged credit card debt was joint marital debt was based on the credibility of the witnesses at trial. We must give special deference to the trial court's findings when they are based on the credibility of the witnesses. *Draggoo, supra* at 429. Clearly the trial court was aware of defendant's gambling, extramarital affairs, and dishonesty issues, and even assigned fault for the breakdown of the marriage as a result of defendant's activities. And the trial court had the ability to assign debts to defendant if it determined that the debts were the individual responsibility of defendant. *Lesko, supra* at 401. But after reviewing all the testimony and record evidence presented regarding the debts, the trial court specifically declined this opportunity. After reviewing the circumstances in this case, and giving "special deference to [the] trial court's findings when they are based on the credibility of the witnesses" *Draggoo, supra* at 429, we are not left with a definite and firm conviction that a mistake has been made, and decline to disturb the trial court's determination on this issue. *Sparks, supra* at 151.

D.

Plaintiff argues that the trial court erred when it allowed defendant to count monies owed to Mercantile Bank that were used to finance expert witness fees from the divorce action as a portion of the parties' debt attributed to defendant. Defendant argues that the trial court specifically authorized defendant to borrow money to pay for expert witness testimony in the divorce. Defendant further contends that the record displays plaintiff received \$10,000 in proceeds from the loan and defendant only received \$3,000. It is defendant's position that plaintiff's argument is absurd considering that the record shows the result of the loan is that defendant actually financed \$10,000 of plaintiff's own expert witness fees.

Our review of the record reveals that during a hearing on April 30, 2004 defendant requested permission to take out a loan to cover expert witness fees that would be incurred to value the parties' business assets for divorce litigation purposes. The trial court explicitly approved defendant's request. Defendant then took out a loan in the amount of \$13,804 from Mercantile Bank in order to finance expert witness fees. During trial, defendant testified that he provided \$10,000 from the loan to plaintiff's attorney and paid \$3,000 to his own lawyer in order to finance the expert witness fees. The trial court considered this loan as a marital debt and assigned it in total as defendant's responsibility. After reviewing the record, we do not find error in the trial court's conclusion. After reviewing the circumstances in this case, plaintiff has not established clear error and we decline to disturb the trial court's determination on this issue. *Sparks, supra* at 151.

E.

Plaintiff argues that the trial court's adoption of defendant's proposed asset/debt schedule does not reflect the actual allocation of assets or debts, and is unjust, erroneous, and totally misleading. Plaintiff asserts that a realistic analysis of the economics of the trial court's distribution of the marital assets illustrates that the trial court left plaintiff with only 3.6201% of the assets and defendant with 96.8086% of the assets. Defendant argues that the record shows that the trial court clearly awarded plaintiff 55% of the non-business marital assets and defendant with 45% and equally divided the parties' business assets. Defendant characterizes plaintiff's argument as grossly misleading and absurd.

Our review of the record reveals that plaintiff's argument is without merit. At the outset, plaintiff's characterization of the property disposition as 3.6201%/96.8086% is not supported by the record. Regarding the parties' non-business marital assets, the trial court used defendant's proposed division of assets and liabilities spreadsheet only as a jumping off point. The trial court specifically assigned values to the parties' real property, retirement assets, stock options and deferred compensation, bank accounts, vehicles, and debts after evaluating the evidence presented by the parties. The trial court allocated individual assets and liabilities based on its findings of fact regarding valuation. Once the trial court allocated all of the parties assets and liabilities between the parties, in order to balance the property settlement in a 55% to plaintiff and 45% to defendant apportionment, the trial court ordered defendant to make up the balance in the form of a cash payment to plaintiff in the amount of \$24,727 sourced from defendant's premarital IRA. The record also reveals that the trial court considered the valuation of Pyper Products separately from the non-business assets and used a different factor when it allocated Pyper Products between the parties. It split the non-business assets equally.

Again, the trial court orders clearly display that the trial court awarded plaintiff 55% of the non-business assets and 50% of the business assets. Plaintiff arrives at her conclusion that she was left with only 3.6201% of the assets and defendant with 96.8086% of the assets only by intermingling the trial court's non-business and business distributions. Further, she arrives at her conclusion by stating that the trial court credited defendant with the value of his stock in Pyper Products while completely ignoring the \$856,000 cash award apportioned to her in the division of the business assets. Plaintiff's argument is without merit.

F.

Plaintiff argues that the trial court's imposition of a specific property settlement payment stream and interest factor renders the award a nullity. Plaintiff specifically asserts that although the trial court's initial ruling awarding her \$856,000 representing 50% of the value of the parties' equity in Pyper Products, later rulings setting the payment stream "totally nullify its value" and amount to "an economic lynching." Instead, she asserts that the trial court should have instituted an in-kind stock transfer. Defendant responds that in-kind stock awards do not work in these situations and asserts that the trial court properly exercised its discretion when it compensated plaintiff with a substantial cash award payable, with interest, over a period of years.

After reviewing the record, we agree with defendant that the trial court did not err when it awarded plaintiff her share of the interest in Pyper Products in the form of an equivalent cash award, as opposed to an in-kind stock award. As this Court explained in *Olson v Olson*, 256 Mich App 619, 624-626; 671 NW2d 64 (2003), multiple problems can arise when stock in a closely held corporation is divided among divorcing parties. It is rare that a divorcing couple can maintain an ongoing business relationship in a closely held corporation. See also *McDougal v McDougal*, 451 Mich 80, 91 n 9; 545 NW2d 357 (1996). After reviewing the record, we believe this case falls within this rule rather than the rare exception.¹

Next, we address plaintiff's argument that the payment schedule adopted by the trial court nullified the value of the \$856,000 cash award and amounted to "an economic lynching." The trial court held a special evidentiary hearing to determine payment terms for plaintiff's share of Pyper Products and invited the parties to present proposals and evidence regarding proper payment terms. After hearing evidence about the financial stability of Pyper Products as well as defendant's personal ability to pay the cash award to plaintiff, the trial court directed defendant to pay plaintiff \$4,000 per month until the satisfaction of the debt. The payments were to commence at termination of defendant's spousal support obligation to plaintiff. Noting that plaintiff deserves to be paid her share of Pyper Products sooner than later, but acknowledging the present economic realities facing the business, the trial court attempted to balance the equities and set a 7% interest rate on the award to encourage early payment to plaintiff. See *Thomas v Thomas (On Remand)*, 176 Mich App 90, 92; 439 NW2d 270 (1989). Further attempting to protect the interests of the parties over the long term, the trial court mandated a review at eleven

¹ We note that an in-kind stock transfer may upset the legal requirements of an MBE and possibly affect its favorable treatment.

years based on expert testimony about the financial future of Pyper Products and also suggested that counsel seek intermittent reviews every three years.

While we commend the trial court's efforts in attempting to fashion a remedy that balances the equities, the payment plan adopted by the trial court is, in fact, inequitable. A critical review of the financial evidence provided in the record reveals that the payment plan does not account for payment of both principal and interest. Stated differently, a monthly payment of \$4,000 does not ensure that plaintiff receives a fair and equitable share of the value of the \$856,000 award in a timely manner because in essence the entire monthly payment is composed only of interest. Therefore, we vacate the trial court's current repayment plan and remand the issue of the payment stream to the trial court for adoption of a new payment schedule. The trial court should, together with input from the parties, determine and adopt a new payment plan that amortizes the value of the \$856,000 cash award over a reasonable period of time while at the same time provides for timely payment of both principal and interest.

For these reasons, we decline to reverse the trial court's decision to the extent that the court awarded plaintiff an equivalent cash award representing her share of the parties' equity interest in Pyper Products. However, we vacate the trial court's current repayment plan and remand the issue of the payment stream only to the trial court for adoption of a new amortization schedule.

V

Plaintiff finally argues that the trial court's failure to award her reasonable attorney fees was not fair and equitable in light of the facts of the case. In support of her argument, plaintiff relies only on her testimony that her attorney fees totaled approximately \$86,000 and that she does not have the funds "or any economic prospects" to pay the attorney fees and needs an award from the court. Plaintiff asks this court to grant her a "60% attorney fee award of \$51,600.00." Defendant argues that the trial court properly exercised its discretion when it refused to award plaintiff attorney fees. We review a trial court's decision whether to award attorney fees for an abuse of discretion. *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007). A trial court abuses its discretion when it selects an outcome that is not within the range of reasonable and principled outcomes. *Id.* at 672.

Under the "American rule," attorney fees will not be awarded unless expressly allowed by statute, court rule, common-law exception, or contract. *Reed v Reed*, 265 Mich App 131, 164; 673 NW2d 825 (2005). In divorce actions, attorney fees are not recoverable as of right. *Id.* However, attorney fees are authorized under MCL 552.13 and MCR 3.206(C), and may be awarded "when a party needs financial assistance to prosecute or defend the suit." *Id.* MCL 552.13 provides: "In every action brought, either for divorce or for a separation, the court may require either party to pay . . . any sums necessary to enable the adverse party to carry on or defend the action, during its pendency." And, MCR 3.206(C) provides:

- (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 or a specific proceeding, including a post-judgment proceeding.

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, and that the other party is able to pay

The party requesting the fees has the burden of showing need and that the fees were reasonable and in fact incurred. *Borowsky, supra* at 687; *Reed, supra* at 165. Attorney fees should only be awarded if necessary to allow a party to defend or prosecute an action. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992).

The record shows that defendant took out a loan in the amount of \$13,804 from Mercantile Bank in order to finance expert witness fees. Testimony established that he provided \$10,000 from the loan to plaintiff's attorney and paid \$3,000 to his own lawyer in order to finance the expert witness fees. In support of her request for attorney fees plaintiff testified that she had incurred \$86,000 in attorney fees and \$27,000 in expert witness fees. Plaintiff provided no evidence other than highlighting the disparity in the parties' annual incomes. And, plaintiff offered no testimony or other evidence that defendant was able to pay. The trial court made no specific findings regarding either parties' ability to pay and simply declined plaintiff's request stating she "will be held responsible for her own attorney fees." After reviewing the record, we conclude that plaintiff did not allege sufficient facts to demonstrate that she was "unable to bear the expense of the action, and that the other party is able to pay." MCR 3.206(C)(2)(a). Therefore, we find no abuse of discretion because the trial court selected an outcome within the range of reasonable and principled outcomes. *Borowsky, supra* at 672.

VI

On cross-appeal, defendant challenges the trial court's valuation of the parties' interest in Pyper Products. Defendant asserts that the automotive supply company had no value in excess of significant debt it carried. The trial court's valuation of assets is reviewed for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); *Draggoo, supra* at 429. "[W]here a trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present." *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

Regarding the valuation of Pyper Products, the trial court found as follows:

The Court will first address the issue of the valuation of the businesses, Pyper Products and Talent Trax.

The Court heard the testimony of Mr. Adamy, Mr. Gilbert, and on rebuttal Ms. Christine Baker.

The Court further has reviewed the submitted reports of these business evaluation experts.

The Court finds that the appropriate valuation of the business is pursuant to Ms. Baker's testimony, based on her – I'm not going to go into the rationale, but the Court does adopt her position with regard to the valuation of the business.

Therefore, it is the Court's order that Pyper Products shall be valued at \$3,269,000.00.

[Defendant] has a 55 percent interest in this business, which would be \$1,797,950.00.

There is debt associated with the business of \$85,700.00, which shall be deducted for a total equity of \$1,712,250.00.

[Plaintiff's] interest is, therefore, \$856,000.

With regard to the value of Talent Trax, the Court adopts Mr. Adamy's valuation of this business at \$35,000.00, pursuant to his report of December 31, '04.

[Defendant] has a 40 percent interest in this business, which would be the amount of \$14,000.00, less the outstanding debt of approximately \$9,547.00, for a total equity of \$4,500.00.

[Plaintiff] would be entitled to half that amount.

With regard to the business valuation, and specifically with regard to the award to [plaintiff], the Court is specifically finding that [plaintiff] has a 50 percent interest, not 55 percent or 60 percent as the briefs had evaluated.

Defendant sets forth three separate arguments supporting his valuation claims.

A.

Defendant argues that the trial court erred when it failed to make any findings of fact or conclusions of law in support of its valuation of Pyper Products in violation of MCR 2.517. Plaintiff responds that the trial court fulfilled its fact-finding role when it properly based the valuation of Pyper Products on the expert testimony and analysis provided by Baker. MCR 2.517(A), states in pertinent part as follows:

- (1) In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.
- (2) Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.
- (3) The court may state the findings and conclusions on the record or include them in a written opinion.

Further, a court is not required to comment on every matter in evidence or every argument made by the parties. *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993).

The trial court heard extensive testimony about the valuation of Pyper Products during trial. Plaintiff's expert, Marc Gilbert, testified that Pyper Products should be valued at \$4.5 million. Defendant's expert, Eric Adamy, testified that Pyper Products had no value in excess of its substantial debts. Plaintiff then presented rebuttal testimony through another expert, Christine Baker, who criticized Adamy's methodology and testified that in her opinion, \$3,269,000 represented the correct equity value of Pyper Products. The record reveals that the trial court reviewed the competing expert testimony provided by the three expert witnesses, Adamy, Gilbert, and Baker, as well as the parties' exhibits. The trial court made the requisite findings and conclusions when decided among the competing business valuation methodologies placed on the record and ultimately adopting Baker's opinion of the equity value of Pyper Products. We conclude that the trial court's findings comport with the court rule's acknowledgment that factual findings can be "brief, definite, and pertinent . . . without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). Although defendant may not agree with the court's findings, this does not make them insufficient and the trial court's judgment does not violate MCR 2.517.

B.

Defendant contends that the trial court committed clear error in adopting rebuttal testimony provided by expert Baker regarding the value of the parties' interest in Pyper Products. Defendant specifically contends that the trial court failed to fulfill its role as gatekeeper in violation of MRE 702 when it accepted Baker's opinion regarding the value of Pyper Products because Baker lacked sufficient facts and data to offer an opinion. And, defendant states that the trial court ignored the fact that Baker did not actually value Pyper Products. Plaintiff counters that the trial court did fulfill its role as gatekeeper and did not violate MRE 702 because Baker was properly qualified as an expert and further, her rebuttal testimony was properly admitted to assist the trier of fact in understanding the evidence and making determinations on the issues presented at trial.

While defendant frames this issue as one only involving MRE 702, to review this issue, we must engage in a two part analysis and determine if (1) the testimony was proper rebuttal testimony, and, (2) the testimony was proper under MRE 702. "Admission of rebuttal testimony rests within the sound discretion of the trial judge and will not be disturbed unless a clear abuse is shown." *Nolte v Port Huron Area School Dist Bd of Ed*, 152 Mich App 637, 644; 394 NW2d 54 (1986). The qualification of a witness as an expert and the admissibility of the expert's testimony are within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *Tobin v Providence Hosp*, 244 Mich App 626, 654; 624 NW2d 548 (2001). Again, an abuse of discretion occurs when the trial court's decision falls outside of the range of reasonable and principled outcomes. *Maldonado, supra* at 388.

"Rebuttal testimony is used to contradict, explain, or refute evidence presented by the other party in order to weaken it or impeach it." *Winiemko v Valenti*, 203 Mich App 411, 418; 513 NW2d 181 (1994). If evidence is responsive to evidence presented by the defendant, it is rebuttal even if it overlaps with evidence admitted during the plaintiff's case in chief. *People v Figures*, 451 Mich 390, 399; 547 NW2d 673 (1996). However, "a party may not introduce evidence competent as part of his case in chief during rebuttal unless permitted to do so by the court." *Winiemko, supra* at 419.

Defendant contends that the trial court should not have permitted Baker to testify as a rebuttal witness. Specifically, defendant argues that Baker was not a proper witness to rebut the testimony of his expert witness, Adamy, because Adamy performed a thorough and comprehensive business valuation based on raw data including but not limited to interviews, visits to the business, and witnessing its operations. Defendant contends that because Baker was not engaged to value Pyper Products and in fact never performed her own personal business valuation, she was not a proper witness to rebut Adamy's testimony. Plaintiff contends that although Baker never performed her own analysis of raw data to value the business, her testimony was properly offered in rebuttal for the specific purpose of critical expert analysis of the methodologies offered by defendant's expert witness.

At trial, the trial court qualified Baker as an expert witness in the area of business valuation based on defense counsel having no objections to her qualifications.² But, the trial court required plaintiff to lay a foundation to show that Baker was qualified to rebut defendant's expert witness testimony, and to show on what basis Baker based her conclusions. Defendant's first objection to Baker's testimony and ensuing argument is as follows:

Plaintiff: Now I want to ask you in a general sense with respect to approaching a valuation such as that involving Pyper Products, I'd like you to tell this Court what you believe to be the appropriate methodology or the appropriate approach to take.

Defendant: Well, I want to object, your Honor. I don't think there's sufficient foundation for her to testify along these ways. She's only indicated that she's reviewed two reports, no financial statement, no visit to the plant, no review of testimony that's been happening in this trial, I don't think there's any foundation for her to be offering what appears to be expert witness about what is the appropriate valuation methodology for this company.

Plaintiff: Well these reports all came into evidence, your Honor. Those have been reviewed by the witness. I believe the witness said she's reviewed the financial statements as well. And I think, and I think what I'm doing and what

² The record reflects that at the time of trial Baker was a CPA employed as a principal with the Rehmann Group. Baker testified that she was previously a partner in a valuation specialty firm called Economic Advisors, and before that was with Plante Moran. Baker held a specialty credential offered by the American Institute of Certified Public Accountants in business valuation and was one of 13 members the AICPA Business Valuation Committee nationwide. She also served on the Michigan Association of Certified Public Accountant's litigation and business valuation task force. Baker had presented at professional seminars with respect to valuation issues on local, state, and national levels. At the time of the trial she had completed approximately 290 to 300 business valuations, had performed business evaluations in the divorce context, and had previously been qualified as an expert witness in the field of valuation in Michigan.

this witness is doing is laying a foundation for her analysis of those reports and the methodology.

Defendant: Well the question to her first was “What is the appropriate method?” And there’s no basis for her to give the Court that testimony when she herself hasn’t done an evaluation of this business. I just don’t understand how she could come close to just reviewing documents. If there’s a – there’s a sensitive area she’s going to address, perhaps that would be a proper rebuttal testimony, but to go through the whole thing is absurd. That’s not even rebuttal testimony. That’s new testimony.

Plaintiff: I respectfully differ with counsel’s assessment here. I think as far as laying a foundation for this witness is critical analysis and I use those words because those were the exact words contained in the disclosure prior to settlement conference with respect to this witness’s testimony, critical analysis of what Mr. Adamy, we understood he would be testifying to, and the methodologies applied by both other experts. And I think asking this witness as far as her conclusions as to the appropriate methodology to follow, is laying a foundation for the analysis of those opinions.

The Court: I’m going to sustain the objection and ask for a further foundation as to whether she is able to make this opinion, and on what basis, before it is rendered to the trial court.

Defendant objected throughout Baker’s testimony at least eight additional times over the course of plaintiff’s attempt to lay the foundation required by the trial court for Baker’s testimony. The trial court addressed each objection substantively. After finding that plaintiff had developed a sufficient foundation for the testimony, the trial court allowed Baker to provide her opinion regarding the calculations Adamy used to arrive at his net value of equity figure and to provide recommended modifications and corrections to Adamy’s figure. Ultimately, finding that it was appropriate rebuttal testimony, the trial court allowed Baker to provide her own recalculation figure of Adamy’s expert calculation in the amount of \$3,269,000.

After reviewing the testimony provided in the record we conclude that the trial court did not abuse its discretion in permitting plaintiff to rebut defendant’s calculation of the value of Pyper Products with expert opinion evidence that modifications needed to be made to correct errors in Adamy’s valuation figure. Baker’s rebuttal testimony was clearly used to contradict and refute the valuation evidence presented by defendant’s expert witness. This is a proper use of rebuttal testimony. *Winiemko, supra* at 418. And, contrary to defendant’s argument, Baker need not, as a rebuttal witness, perform an entirely new valuation from raw source data in order to accomplish the task of reviewing Adamy’s work while utilizing his work product and her own expert experience. As evidenced in the record, the point of plaintiff’s proffering of Baker’s testimony was to establish errors committed by Adamy in his expert valuation, and in fact impeach its credibility. Again, this is a proper use of rebuttal testimony. *Id.* Thus, no error occurred and the trial court did not abuse its discretion in permitting Baker’s rebuttal testimony based on Baker’s thorough review of the sum and substance of Adamy’s valuation reports including various exhibits and supporting documentation.

Defendant also argues that Baker was not qualified to give rebuttal testimony on the valuation of Pyper Products, because she had not performed her own personal valuation of the company. A trial court serves as a gatekeeper under MRE 702 to ensure that any expert testimony admitted at trial is reliable. *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601-602; 705 NW2d 703 (2005), remanded in part, 477 Mich 1067 (2007). A witness may be qualified as an expert “by knowledge, skill, experience, training, or education.” MRE 702. MRE 702 provides specifically that:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The gatekeeper role “mandates a searching inquiry” that a trial judge may neither abandon nor perform inadequately. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780, 782; 685 NW2d 391 (2004). Where the trial court fails to properly exercise its function as a gatekeeper, the appropriate remedy is to vacate the court’s order and remand the case to the trial court. *Clerc, supra* at 603.

Arriving at a reliable and correct valuation of Pyper Products involved a complicated financial calculation concerning the evaluation of countless economic factors. Baker testified that as a business valuation expert, she was knowledgeable about the proper procedures, assumptions, and methodologies to employ to arrive at a correct business valuation. Baker also testified that she used her own expert methods to review and correct the analysis provided by Adamy in this case. Throughout her testimony, defendant regularly objected. Defendant also had the opportunity to challenge Baker’s testimony and the corrections she believed were necessary to correct Adamy’s valuation. The trial court clearly found that Baker’s testimony would assist it in both understanding and determining the facts of the case. And that she would provide reliable testimony. Accordingly, the trial court did not abuse its discretion in permitting Baker’s expert testimony at trial.

C.

Finally, defendant asserts that the trial court erred in failing to select and apply any method of valuation and in doing so failed to determine a value within the range established by the proofs. Plaintiff counters that the trial court did in fact select Baker’s method of valuation of Pyper Products and thus did select a value within the range established by the proofs. “The general rule applicable to valuation of marital assets is that the party seeking to include the interest in the marital estate bears the burden of proving a reasonably ascertainable value” *Wiand v Wiand*, 178 Mich App 137, 149; 443 NW2d 464 (1989). “The trial court may, but is not required to, accept either parties’ valuation evidence.” *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988). Where marital assets are valued between divergent estimates, the trial court has great latitude in arriving at a final figure. *Id.* at 26. The trial court is in the best position to judge the credibility of the witnesses. *Id.*

After reviewing the record, we are not persuaded that the trial court abused its discretion when it determined the appropriate valuation of Pyper Products. The trial court heard extensive testimony about the valuation of Pyper Products during trial. The trial court rejected plaintiff's expert, Gilbert's, testimony that Pyper Products should be valued at \$4.5 million. The trial court also rejected defendant's expert, Adamy's, testimony that Pyper Products had no value in excess of its substantial debts. After reviewing the competing expert methodologies provided by the three expert witnesses, Adamy, Gilbert, and Baker, as well as the parties' exhibits, the trial court credited Baker's testimony that provided a corrected valuation in the amount of \$3,269,000 as the equity value of Pyper Products. We cannot conclude that the trial court's valuation was clearly erroneous in light of the trial court's assessment of credibility and the great disparity between the multiple valuations and methodologies employed. The trial court's ultimate determination of the value was within the range established by the proofs, and therefore, the trial court did not clearly err in its valuation.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ Pat M. Donofrio

/s/ David H. Sawyer

/s/ William B. Murphy