STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN M. SHOOK,

Plaintiff-Appellant,

v

GREGORY D. SHOOK,

Defendant-Appellee.

UNPUBLISHED
August 6, 2009

No. 283294
Shiawassee Circuit Court
LC No. 07-005293-DO

Before: Zahra, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's division of the marital estate and award of spousal support in the judgment of divorce. We conclude that the trial court erred when it deducted the value of a potential real estate commission from the parties' equity in the marital home without any evidence that the home would be sold in the near future. Therefore, we reverse the trial court's judgment to the extent that it undervalued the parties' equity in the marital home. Because we conclude that there were otherwise no errors warranting relief, in all other respects, we affirm.

Plaintiff first argues on appeal that the trial court erred when it deducted real estate commissions from the equity of both the marital home and the Florida condominium. This Court reviews a trial court's factual findings for clear error. *McNamara v Horner (After Remand)*, 255 Mich App 667, 669; 662 NW2d 436 (2003). A finding is clearly erroneous if, after a review of the entire record, we are left with a definite and firm conviction that a mistake has been made. *Id.* If we uphold the trial court's findings, we must then determine whether the dispositional ruling was fair and equitable in light of those facts. *Id.* at 670.

"The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. The trial court need not divide the marital estate into mathematically equal portions, but any significant departure from congruence must be clearly explained." *Berger v Berger*, 277 Mich App 700, 716-717; 747 NW2d 336 (2008) (citation omitted). A trial court may consider the following factors:

> (1) the duration of the marriage, (2) the contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life situation of the parties, (6) the necessities and circumstances of the parties, (7) the parties' earning abilities, (8) the parties' past relations and conduct, and (9) general

> principles of equity. When dividing marital property, a trial court may also consider additional factors that are relevant to a particular case. The trial court must consider all relevant factors but "not assign disproportionate weight to any one circumstance." [*Id.* at 717 (citations omitted)]

A trial court must make specific findings of fact regarding the factors it considered. *Sparks v Sparks*, 440 Mich 141, 159; 485 NW2d 893 (1992).

The trial court may consider fees, such as realtor commissions, "if in the opinion of the trial court the parties have presented evidence that causes the court to conclude that it would not be speculating in doing so . . . ." *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993). Thus, while a trial court may consider the effects of realtor fees under some circumstances, it is not obligated to do so. In this case, however, there was no evidence to suggest that the marital home would be sold. Indeed, the testimony established the exact opposite: defendant planned to live in the home with two of his children. Therefore, the trial court clearly erred in reducing the equity in the marital home to account for a realtor commission. Defendant is correct to note that the average of the real estate commissions (based on both a $212,000 and a $185,000 selling price) is $12,950, half of which equals $6,947.50, and is the amount to which plaintiff is entitled.

Regarding the Florida condominium, plaintiff argues that the property was occupied by a renter and not listed for sale at the time of trial, and therefore, the trial court erred in deducting a real estate commission. While it is true that the property was not listed for sale at the time of trial, the current tenant's lease expired at the end of the month in which the trial occurred. Defendant envisioned the possibility of finding another renter, but stated that he preferred to sell the property, despite previously unsuccessful attempts. Therefore, the trial court did not plainly err when it deducted a real estate commission from the equity of the Florida condominium.

Plaintiff next argues on appeal that the trial court clearly erred in finding that the value of the parties' condominium property in Florida was zero.

"[I]t is settled law that trial courts are required by court rule to include a determination of the property rights of the parties in the judgment of divorce. As a prelude to this property division, a trial court must first make specific findings regarding the value of the property being awarded in the judgment." *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003) (citations omitted). A court can make such a valuation via expert testimony, lay testimony, or the parties' testimony. *Id*. at n 4. "[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).

Plaintiff contends that because defendant made the statement regarding his conversation with the realtors (wherein they told him another unit in the complex had lowered its asking price to $235,000) before he was put under oath, the statement is inadmissible, and furthermore, there was no testimony that any other units were listed for $235,000 at the time of trial. These arguments are without merit.

When relating the facts on which the parties agreed, plaintiff's counsel stated that the condominium "was purchased a couple of years ago for approximately $260,000" and had "a

$204,000 payoff . . . ." Defendant confirmed that the couple bought the condominium in 2005 for $260,000, and in 2006, the couple "had it listed twice – didn't get any bites on it." After these failed attempts to sell it, the couple leased the unit for a year, but the lease was up at the end of August 2007, and according to defendant "if it's not rented, then I've . . . got a real financial crisis on my hands." When plaintiff's counsel professed doubt that the real estate market had declined, defendant explained that he had talked to several real estate brokers and was informed that, "there's a condo just like ours that's been for sale for $235,000 in our complex, and they've had no bites on it. I . . . just don't think it's realistic we're going to sell it for any more than that, if, if even that much." It was after defendant made this statement that the trial judge realized that he had not put the parties under oath, and then proceeded to do so.

Plaintiff, testifying after she had been put under oath, agreed that the couple bought the condominium for $260,000 and stated, "you know, I'm not a realtor, so I don't know. I, I'm assuming it's close to that value if not right, right near there." When asked her assessment of the state of the Florida real estate market, plaintiff responded, "[t]hat's a hard call. I know that [defendant] told me that he got an e-mail from one of the realtors and there were several in there for sale, and someone had lowered their price to [$234,000] like [defendant] has stated. I have not talked with any of the realtors to see what the market is in that area. I, I would have to go by what [defendant] stated – if, if indeed he sold it. If he holds onto it, then I'm going to maintain I still think the value is [$260,000] . . . ."

Therefore, plaintiff's own testimony confirmed that other condominiums in the complex had lowered their prices – and she stated the figure as $234,000. Given the extent of her testimony, plaintiff "cannot complain that the finding by the trial court [that the condominium was worth $230,000] is erroneous, when no expert testimony was presented on the question and there was no offer to bring in a professional appraiser nor a request to supplement the record." *Sullivan v Sullivan*, 175 Mich App 508, 511; 438 NW2d 309 (1989). Since plaintiff agreed that the payoff was $204,000, and, as discussed above, it was proper for the trial court to account for a realtor commission, the trial court did not clearly err in concluding that the value of property was zero. The decision was also fair and equitable in light of the fact that defendant was assuming a financial risk on the condominium.

Plaintiff next argues on appeal that the trial court erred by requiring that plaintiff use her share of the equity in the marital home over a period of years to support herself.

> The same review standard applicable to the division of marital property applies to awards of spousal support. The trial court's factual findings are reviewed for clear error. If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts. The trial court's dispositional ruling must be affirmed unless the appellate court is firmly convinced that it was inequitable. [*Berger*, *supra* at 727 (citations omitted).]

"The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case." *Id.* at 726. The trial court should consider several factors, including:

> "(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 alimony, (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." [*Id.* at 726-727, quoting *Olson*, *supra* at 631.]

In certain situations, "*where both parties are awarded substantial assets*, the court, in evaluating a claim for alimony, *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) (emphasis added). Relying on *Hanaway*, plaintiff argues that the court clearly erred by requiring her to use her share of the marital property (in addition to the alimony payment) in order to support herself.

In this case, the trial court engaged in various calculations to determine that plaintiff's equity in the marital home was $45,000,[1] and the court allowed defendant to pay this off at a monthly rate of $375. The court next addressed spousal support, stating, "given the length of the marriage, the disparity of the incomes, . . . the Court concludes that alimony of $325 a month that would take [plaintiff] to her retirement age of 62 [a ten-year period] would be a fair resolution." The court further explained that the spousal support was to continue to age 62 because "it is my objective to get [plaintiff] to retirement age where she will be able to draw her social security . . . and effect her retirement. The equity buyout . . . also gets her to age 62, however [defendant] has the option of doing that in monthly payments, or he can buy it out at any time."[2] Based on the court's statement, it is clear that the judge awarded plaintiff her fair share of the equity in the marital home, and then, as a separate consideration, determined that $325 a month was appropriate for alimony. This result was fair and equitable.

Moreover, *Hanaway* is not directly on point because it addressed a situation where *substantial* assets were involved and where the disparity in incomes between the parties was even greater than in the case at bar.[3] In *Hanaway*, where the plaintiff's income was $27,000 and the defendant's was $371,000, the plaintiff was awarded cash and other assets worth over $560,000, but she was *not* awarded alimony. *Hanaway*, *supra* at 291, 296. This Court found that the trial court "put too much weight on the value of the property awarded to plaintiff," and the "plaintiff should not be expected to consume her capital to support herself." *Id.* at 296.

---

[1] As discussed above, this number will need to be adjusted to account for the error in deducting the realtor fee.

[2] At oral argument, the parties agreed that defendant had since refinanced the marital home and paid plaintiff her share of the home's equity.

[3] Plaintiff's annual salary is $30,000 while defendant earns just under $90,000.

In this case, far from having "substantial assets," the couple had their retirement accounts (worth roughly $140,000 combined), which the court split equally, and the marital home, which the court split equitably (by accounting for credit card debt, and the fact that plaintiff's car and life insurance policy were worth more than defendant's). As noted, the court found no equity in the Florida condominium and considered it more of a liability due to the difficulty in selling it. The $325 a month alimony payment reflected the court's consideration of the length of the couple's marriage and their disparity in income, and did not take into account plaintiff's share of the marital home. Therefore, the court's property disposition and award of alimony do not run afoul of *Hanaway* and are not inequitable.

Plaintiff next argues that the trial court incorrectly assigned fault as a punitive basis for limiting alimony, as evidenced by the court advising plaintiff to consider counseling and noting that she asked for the divorce.

As already noted, "[t]he object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case." *Berger*, *supra* at 726. The court can consider several factors, including "a party's fault in causing the divorce." *Id.* at 727. Plaintiff claims that the court nevertheless erred in assigning fault, as evidenced by the judge advising plaintiff to consider counseling and noting that she asked for the divorce. We find that the record suggests otherwise.

In this case, the trial court, in fact, did *not* consider fault in awarding plaintiff alimony, but rather, the court cited the length of the marriage (nearly 33 years) and the disparity in income between the parties (defendant earned nearly three times as much in gross annual salary). In determining what was just and reasonable in this case, the court was cognizant of the fact that defendant had taken on the responsibility of paying off the couple's credit card debt and either selling or renting the Florida condominium, which was a significant financial risk for defendant. Furthermore, in making its award, the trial judge specifically stated that he wanted plaintiff to receive support from defendant until she reached retirement age and was entitled to social security income and pension benefits.

It is true, as plaintiff contends, that the trial judge asked plaintiff if she wished to go forward with her proofs and he twice inquired whether she would consider more marriage counseling; however, he was recommending that *both* parties undergo counseling. The trial judge did note the fact that plaintiff had been the one to initiate divorce proceedings, however, this was in response to plaintiff's request for attorneys fees, and he specifically stated, "[t]he parties will be respectively responsible because . . . I don't find any extenuating fault circumstances that would prompt the court to favor either party in that respect, and, in addition, it was the plaintiff's determination to effectuate the divorce."

Finally, even if the trial court *had* taken fault into account when determining the proper amount of spousal support,

> 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. [*Hanaway, supra* at 297.]

In *Hanaway*, where the trial court properly considered fault and several other factors, this Court concluded, "[w]hile we would not have penalized plaintiff to the extent of a twenty percent differential in the property distribution, we are unable to say that the distribution was inequitable on this ground alone." *Id.* Therefore, in the case at bar, where the court did not consider fault, and equally divided the retirement benefits and the equity in the marital home, there was no error and the result was fair and equitable.

Affirmed in part, reversed in part and remanded for amendment of the judgment to reflect the increased equity in the marital home. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Michael J. Kelly