STATE OF MICHIGAN

COURT OF APPEALS

LORI SHARKEY,

Plaintiff-Appellee,

v

PATRICK SHARKEY,

Defendant-Appellant.

UNPUBLISHED
September 15, 2009

No. 286135
Genesee Circuit Court
LC No. 06-268700-DM

Before: O'Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

Defendant appeals as of right from an amended judgment of divorce. We affirm, but remand for the limited purpose of requiring the receiver to post a bond.

Defendant first argues that the trial court erred by refusing to enforce the parties' pre-divorce settlement agreement. We disagree. This Court will not reverse a trial court's finding regarding the validity of a party's consent to a settlement agreement absent an abuse of discretion. *Lentz v Lentz*, 271 Mich App 465, 474-475; 721 NW2d 861 (2006). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).

As this Court has previously stated:

> 'It is a well-settled principle of law that courts are bound by property settlements reached through negotiations and agreement by parties to a divorce action, in the absence of fraud, duress, mutual mistake, or severe stress which prevented a party from understanding in a reasonable manner the nature and effect of the act in which she was engaged.' [*Lentz, supra* at 474, quoting *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990).]

This rule is consistent with the notion that "[a]bsent fraud, coercion, or duress, the adults in the marriage have the right and the freedom to decide what is a fair and appropriate division of the marital assets . . . ." *Lentz, supra* at 472. A property settlement agreement is subject to the rules and principles governing contracts in general. *Id.* at 472-473, 478.

The trial court did not abuse its discretion by determining that plaintiff entered into the agreement as a result of duress or severe stress. Evidence was presented that plaintiff was

subject to verbal and, to a lesser extent, physical abuse at the hands of defendant for 25 years before she filed her complaint for divorce. Defendant was manipulative and degrading to plaintiff, calling her derogatory names on a daily basis. The evidence also showed that defendant was physically and verbally abusive to the entire family, at times causing plaintiff to intervene in physical altercations between defendant and the parties' children.

On the day that plaintiff signed the settlement agreement, she went to the marital home to pay bills and did not anticipate signing such an agreement. Defendant wrote the agreement after plaintiff was at the home for approximately one hour, and plaintiff testified that she signed it because she could no longer "take [defendant's] badgering" and feared for her safety. According to plaintiff, defendant threatened to burn the house down before he would let her have the home and threatened that he would "never take this lying down." Plaintiff stated that she signed the agreement because of defendant's threatening manner, reasoning, "Let's just get out of here. Let's just go." Plaintiff's actions were consistent with her testimony that she did what defendant told her to do because "you don't rock the boat with the man." Thus, the record shows that plaintiff signed the agreement because of duress or severe stress resulting from the nature of the parties' relationship that she endured for 25 years. Although defendant denied many of plaintiff's allegations, the trial court determined that plaintiff was the more credible witness. The credibility of the witnesses was an issue properly determined by the trial court. MCR 2.613(C); *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006).

Defendant likens this case to *Lentz, supra*, but that case is clearly distinguishable from this case. In *Lentz, supra* at 467, the parties negotiated the terms of their separation agreement over a six-week period, a person other than one of the parties drafted the agreement and, because that person was an attorney, answered all of the parties' questions. The defendant also had ample opportunity to review certain business records that were a subject of the agreement, and she sought the advice of her own attorney. *Id.* at 476. These facts are vastly different from those in this case, in which plaintiff was fearful because of the parties' abusive relationship and defendant urged plaintiff to sign the agreement that he drafted after, at best, only an hour's notice. While defendant contends that plaintiff added terms to the agreement, the record shows that plaintiff merely requested that defendant provide her with a vehicle because defendant had demanded that she return the parties' truck to him, leaving her with no means of transportation.

Defendant also argues that the settlement agreement must be enforced because plaintiff has not shown that she was of unsound mind or insane when she signed the agreement. Defendant relies on *Van Wagoner v Van Wagoner*, 131 Mich App 204, 213-214; 346 NW2d 77 (1983), and *Tinkle v Tinkle*, 106 Mich App 423, 426; 308 NW2d 241 (1981), in support of his argument that such a showing is necessary when a party seeks to avoid the terms of a settlement agreement based on duress or severe stress. In those cases, however, the plaintiffs sought to set aside the settlement agreements because of medical concerns and anxiety aggravated by the divorce proceedings. This Court held that the plaintiffs failed to show that they lacked the mental capacity to enter into binding property settlement agreements. *Van Wagoner, supra* at 213-214; *Tinkle, supra* at 426. Unlike those cases, plaintiff here is not arguing that she lacked the mental capacity to enter into a settlement agreement as a result of stress or anxiety stemming from the divorce proceedings. In fact, plaintiff had not yet filed her complaint for divorce at the time that she signed the agreement. Plaintiff's duress or severe stress in this case stemmed from her abusive relationship with defendant, his threatening demeanor, and her long-term

submissiveness because of his controlling personality. Thus, plaintiff was not required to show that she was of unsound mind or insane when she signed the agreement, and plaintiff's general mental capacity to contract is not at issue in this case.

Defendant further argues that the trial court improperly analyzed the terms of the agreement and opined that it was unconscionable. This Court "will not rewrite or abrogate an unambiguous agreement negotiated and signed by consenting adults by imposing a 'reasonable' or 'equitable' inquiry on the enforceability of such agreements." *Lentz, supra* at 478. A review of the trial court's findings reveals that its decision was not based on the terms of the agreement, but rather on its determination that plaintiff signed the agreement under duress or severe stress. The trial court's opinion regarding the illusory and unconscionable nature of the agreement was not germane to its determination regarding the enforceability of the agreement. Thus, the trial court did not abuse its discretion by declining to enforce the agreement.

Defendant next argues that the trial court erred by awarding plaintiff one-third of defendant's pending personal injury settlement. We disagree. We review a trial court's dispositional rulings to determine if they are fair and equitable in light of the circumstances. *Baker v Baker*, 268 Mich App 578, 582; 710 NW2d 555 (2005). This Court should affirm a dispositional ruling unless it is left with the firm conviction that the division was inequitable. *Id.* Further, we review a trial court's findings of fact, including whether a particular asset constitutes marital or separate property, for clear error. MCR 2.613(C); *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002); *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). "A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been committed." *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990).

Defendant relies on *Pickering v Pickering*, 268 Mich App 1, 10; 706 NW2d 835 (2005), in support of his argument that "[p]roceeds from a personal injury suit meant to compensate for pain and suffering are not joint marital property[,]" but rather constitute a spouse's separate property. This rule is inapplicable, however, because any proceeds that defendant may receive from his underinsured motorist claim are not proceeds from a personal injury action meant to compensate him for his pain and suffering. Rather, this Court has previously recognized that because underinsurance protection is not required by law, issues involving such protection are governed by the insurance contract and contract law generally. *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 19; 592 NW2d 379 (1998). Any obligation on behalf of defendant's insurer will arise not because the insurer's actions caused defendant's injuries, but because the other vehicle involved in the automobile accident was underinsured. See *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 53; 731 NW2d 94 (2006). Thus, any proceeds that defendant may receive will not constitute separate property resulting from a personal injury action meant to compensate him for pain and suffering.

In any event, even if the anticipated settlement proceeds are considered personal injury proceeds meant to compensate defendant for pain and suffering, the trial court properly invaded the proceeds under MCL 552.23. Generally, only marital property is subject to division, and a party's separate assets may not be invaded. *McNamara, supra* at 183. A trial court may, however, invade the separate property of a spouse under MCL 552.23(1) if, after division of the marital estate, the property "'awarded to either party [is] insufficient for the suitable support and maintenance of either party[.]'" *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997),

quoting MCL 552.23(1). In other words, the "invasion is allowed when one party demonstrates additional need." *Id.*

Here, the testimony showed that the parties purchased real property in Armada with proceeds from an insurance claim that defendant made as a result of injuries that he suffered in an automobile accident. The trial court determined that this property did not constitute defendant's separate property and that, if it did, it would be necessary to invade the property in order to adequately provide for plaintiff.

By the same token, if any proceeds that defendant may receive from his outstanding underinsured motorist claim are properly considered defendant's separate property, invasion of such proceeds would be necessary to provide for plaintiff's support and maintenance. The record shows that most of the parties' assets at the time of trial consisted of their antique furniture and weaponry collection and equipment previously used in the family masonry business. Plaintiff maintained that certain items in the parties' antique sword collection were missing and that defendant closed their bank accounts without her knowledge and took approximately $28,000 that was in those accounts. After defendant closed the parties' accounts, plaintiff borrowed $16,000 on a credit card to pay for necessary expenses. At the time of trial, she had only approximately $1,000 left and earned $100 cash each week babysitting. Neither party had graduated from high school and neither was doing well financially. Considering the financial condition of the parties, the trial court did not err in determining that plaintiff is entitled to one-third of any proceeds that defendant may receive from his outstanding underinsured motorist claim.

Defendant next argues that the trial court erred by appointing a receiver. "A trial court's order appointing a receiver should be set aside only when the court clearly abuses its discretion." *Reed v Reed*, 265 Mich App 131, 161; 693 NW2d 825 (2005).

Under MCL 600.2926, a circuit court has discretion to appoint a receiver in all cases "where appointment is allowed by law." This Court has interpreted this statute as authorizing the appointment of a receiver not only when specifically allowed by statute, but also "when no specific statute applies but 'the facts and circumstances render the appointment of a receiver an appropriate exercise of the circuit court's equitable jurisdiction.'" *Reed*, *supra* at 161, quoting *Petitpren v Taylor School Dist*, 104 Mich App 283, 292-296; 304 NW2d 553 (1981). "The purpose of appointing a receiver is to preserve property and to dispose of it under the order of the court." *Reed*, *supra* at 162. A trial court should appoint a receiver only in extreme cases, and a party's "past unimpressive performance" may justify such an appointment. *Id.*

Defendant argues that this case is not an "extreme case" necessitating the appointment of a receiver. The record does not support defendant's argument. Trial testimony shows that, after the parties separated, defendant closed all of the parties' bank accounts, keeping approximately $28,000 from the accounts for himself. Plaintiff had to borrow $16,000 on a credit card to support herself financially. When plaintiff arrived at the martial home for an appraisal, defendant placed his hands around her throat and attempted to force plaintiff to kiss him. After she ran to her car, defendant yelled profanities and threw rocks at her. Trial testimony also showed that several of the parties' antique swords were missing from their collection. The parties' antique weaponry collection constituted a substantial portion of their assets.

In addition, the record shows that defendant obstinately refused to cooperate with the receiver and sold items from the parties' weaponry collection, contrary to the trial court's directive on multiple occasions following trial and before the trial court entered the amended judgment of divorce. The missing items were valued at $58,815. Therefore, given defendant's actions, the trial court did not abuse its discretion by appointing a receiver.

Defendant also argues that the trial court erred by failing to require the receiver to post a bond, contrary to MCL 600.2926, which provides that "[i]n all cases in which a receiver is appointed the court shall provide for bond[.]" In accordance with the language of the statute, we remand this case to the trial court for the limited purpose of requiring the receiver to post a bond.

Affirmed, but remanded for the limited purpose of requiring the receiver to post a bond. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens