STATE OF MICHIGAN

COURT OF APPEALS

PATRICE ANN TURKETTE,

Plaintiff/Counter-Defendant/Appellee,

v

JEFFREY JOSEPH TURKETTE,

Defendant/Counter-Plaintiff/Appellant.

UNPUBLISHED
February 23, 2010

No. 287695
Grand Traverse Circuit Court
LC No. 07-005262-DM

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

In this divorce case, defendant, Jeffrey Joseph Turkette, acting *in propria persona* appeals as of right from the judgment of divorce. Because defendant did not establish that the trial court should be disqualified, the trial court did not exceed the statutory maximum with respect to the Navy pension in either the property award or the spousal support award, and did not err in the distribution of marital property, we affirm in part. To the extent the trial court apportioned defendant's disability benefits during his incarceration for the support and maintenance of plaintiff, Patrice Ann Turkette, who was no longer a dependent post-divorce, the trial court erred and we therefore vacate that portion of the trial court's Judgment of Divorce After Trial and remand for an accounting of defendant's VA benefits used for plaintiff's support during the period of incarceration post-divorce and direct that those funds be returned to defendant. We affirm in part, vacate in part, and remand.

I

The parties were married nearly 25 years at the time of divorce. The marriage produced two children, Thomas (born July 23, 1990) and James (born September 11, 1993). Defendant is a retired Navy Master Chief Petty Officer and has been rated 100% unemployable by the Veteran's Administration as a result of multiple disabilities. Defendant is currently incarcerated

after pleading guilty to two counts of possession of child sexually abusive material, MCL 750.145c.[1] On January 26, 2007, Judge Thomas G. Power sentenced defendant to 32 to 48 months in prison. Plaintiff has been a homemaker for the majority of the marriage and a part time substitute teacher. At the time of trial plaintiff was looking for full time work as a teacher. Plaintiff filed for divorce from defendant in November 2007 and the divorce case was assigned to Judge Power. After a two-day bench trial in June 2008, the trial court found defendant to be significantly at fault for the dissolution of the marriage and awarded plaintiff 65% of the marital assets and defendant 35% of the marital assets. The trial court also assigned 65% of the marital debt to plaintiff and 35% to defendant. The trial court signed the Judgment of Divorce on August 25, 2008. It is from that order that defendant now appeals.

II

Defendant first argues that the trial court's conduct and rulings were so contrary to canon, rules of conduct, and law, that an equitable judgment of divorce could not be granted. Plaintiff responds that none of the factors for removing a judge apply in the case, the judge's decision was based on the evidence, and bias did not exist on the record. Defendant, acting *in propria persona*, filed a motion in the trial court to disqualify Judge Power on April 10, 2008. The trial court denied the motion on April 17, 2008 finding that defendant's motion was untimely and without foundation for the reason that the motion was "based on matters occurring during [defendant's] criminal proceedings which occurred many months ago and on procedures for handling certain matters in this case which occurred many weeks or months ago."

Now, on appeal defendant contends that there were several grounds to disqualify the judge. "In reviewing a motion to disqualify a judge, this Court reviews the trial court's findings of fact for an abuse of discretion and reviews the court's application of those facts to the relevant law de novo." *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009). "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).

MCR 2.003(C)(1)(a)[2] provides, in pertinent part:

> (C) Grounds.
>
> (1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

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[1] Defendant's criminal convictions arise from a sexual relationship he began with his 16-year-old step-niece that defendant documented in pictures that he possessed. Defendant's step-niece is from China and only recently arrived in the United States after defendant's brother married a woman from China who had a teen-aged daughter prior to the marriage. Throughout defendant's criminal proceedings he continued to claim that the sexual relationship was consensual as well as the pictures of the girl he had taken during their relationship.

[2] MCR 2.003 was amended on November 25, 2009, at which time the sections were renumbered.

(a) The judge is biased or prejudiced for or against a party or attorney.

To satisfy MCR 2.003(C)(1)(a), the judge must have shown actual bias against the party or the party's attorney. *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001).

A.

Defendant first argues that the trial court improperly "prejudge[d] [d]efendant's divorce in [d]efendant's highly publicized January 2007 criminal sentencing, less than ten months prior to [p]laintiff filing for divorce." Defendant supports his claim for disqualification alleging prejudice evidenced by comments made by Judge Power during defendant's criminal sentencing hearing. Defendant seems to allege that certain comments Judge Power made during his criminal sentencing displayed animus or "ill-will" toward him. He also alleges that at that time, the prosecutor and Judge Power "teamed up" to claim that defendant was insincere and manipulative.

Initially, we conclude that respondent's motion for disqualification was untimely. MCR 2.003(D)(1) requires that a motion to disqualify "be filed within 14 days after the moving party discovers the ground for disqualification," and provides that "untimeliness . . . is a factor in deciding whether the motion should be granted." Defendant's sentencing in his criminal case took place on January 26, 2007, and plaintiff filed her complaint for divorce exactly ten months later on November 26, 2007 and thereafter it was assigned to Judge Power. Defendant filed his motion for disqualification on April 10, 2008. Defendant's argument is solely based on comments Judge Power made during his criminal sentencing. Because defendant's motion for disqualification was filed more than 14 days after he knew or should have discovered the alleged bases for disqualification, it was untimely and was, therefore, properly denied. See *Band v Livonia Assoc*, 176 Mich App 95, 118; 439 NW2d 285 (1989).

Furthermore, even if timely filed, this argument does not establish a ground for disqualification. Defendant has not established that Judge Power was biased or prejudiced against him under MCR 2.003(C)(1)(a). A trial judge is presumed to be impartial and the party who asserts partiality has a heavy burden of overcoming that presumption. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). A trial judge's remarks made during trial, which are critical of or hostile to counsel, the parties, or their cases, ordinarily do not establish disqualifying bias. *Schellenberg v Rochester Elks*, 228 Mich App 20, 39; 577 NW2d 163 (1998). We have reviewed the entire sentencing transcript and it reveals that defendant has taken Judge Power's comments at sentencing out of context and in some instances completely misrepresents the statements. The sentencing transcript simply does not support defendant's argument that Judge Power was biased against him at that time or during the divorce proceedings.

B.

Defendant also argues that Judge Power should have been disqualified because he failed to comply with MCR 2.004 when it did not provide defendant an opportunity to participate in a December 12, 2007 temporary custody, support, and parenting time hearing. MCR 2.004 applies to incarcerated parties and is as follows:

(A) This rule applies to

(1) domestic relations actions involving minor children, and

(2) other actions involving the custody, guardianship, neglect, or foster-care placement of minor children, or the termination of parental rights, in which a party is incarcerated under the jurisdiction of the Department of Corrections.

(B) The party seeking an order regarding a minor child shall

(1) contact the department to confirm the incarceration and the incarcerated party's prison number and location;

(2) serve the incarcerated person with the petition or motion seeking an order regarding the minor child, and file proof with the court that the papers were served; and

(3) file with the court the petition or motion seeking an order regarding the minor child, stating that a party is incarcerated and providing the party's prison number and location; the caption of the petition or motion shall state that a telephonic hearing is required by this rule.

(C) When all the requirements of subrule (B) have been accomplished to the court's satisfaction, the court shall issue an order requesting the department, or the facility where the party is located if it is not a department facility, to allow that party to participate with the court or its designee by way of a noncollect and unmonitored telephone call in a hearing or conference, including a friend of the court adjudicative hearing or meeting. The order shall include the date and time for the hearing, and the prisoner's name and prison identification number, and shall be served by the court upon the parties and the warden or supervisor of the facility where the incarcerated party resides.

(D) All court documents or correspondence mailed to the incarcerated party concerning any matter covered by this rule shall include the name and the prison number of the incarcerated party on the envelope.

(E) The purpose of the telephone call described in this rule is to determine

(1) whether the incarcerated party has received adequate notice of the proceedings and has had an opportunity to respond and to participate,

(2) whether counsel is necessary in matters allowing for the appointment of counsel to assure that the incarcerated party's access to the court is protected,

(3) whether the incarcerated party is capable of self-representation, if that is the party's choice,

(4) how the incarcerated party can communicate with the court or the friend of the court during the pendency of the action, and whether the party needs special

assistance for such communication, including participation in additional telephone calls, and

(5) the scheduling and nature of future proceedings, to the extent practicable, and the manner in which the incarcerated party may participate.

(F) A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings, as described in this rule. This provision shall not apply if the incarcerated party actually does participate in a telephone call, or if the court determines that immediate action is necessary on a temporary basis to protect the minor child.

(G) The court may impose sanctions if it finds that an attempt was made to keep information about the case from an incarcerated party in order to deny that party access to the courts.

Defendant ignores MCR 2.004(F) which states that "[t]his provision shall not apply if the incarcerated party actually does participate in a telephone call, or if the court determines that immediate action is necessary on a temporary basis to protect the minor child." This lower court record does not include the transcript of the temporary custody, support, and parenting time hearing that apparently took place on December 12, 2007 according to the December 12, 2007 Order for Temporary Custody, Support, and Parenting Time which is a part of the record. The order includes a notice stating specifically that the order was being entered "immediately" on the recommendation of the Friend of the Court. MCR 2.004(F) is clear that when "the court determines that immediate action is necessary on a temporary basis to protect the minor child" the protections of MCR 2.004 do not apply. Defendant provides no evidence to refute the order's language that action was required on an immediate basis. Furthermore, defendant was present telephonically for all subsequent hearings as well as the two-day divorce trial pursuant to a series of orders executed by Judge Power. There was no evidence of deep-seated favoritism or antagonism toward defendant demonstrated in this ruling. Defendant has not shown error requiring judicial disqualification.

C.

Defendant next argues that Judge Power should have been disqualified because Judge Power committed clear error when he refused to grant a post judgment hearing pursuant to MCR 2.602(B)(3)(a) and MCR 2.602(B)(3)(c) after defendant's timely objection to plaintiff's proposed judgment of divorce after trial. Whether the trial court violated MCR 2.602 in the entry of the judgment is a question of law. We review questions of law de novo. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006). MCR 2.602(B)(3)(a) and MCR 2.602(B)(3)(c) are as follows:

(B) Procedure of Entry of Judgments and Orders. An order or judgment shall be entered by one of the following methods:

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> (3) Within 7 days after the granting of the judgment or order, or later if the court allows, a party may serve a copy of the proposed judgment or order on the other parties, with a notice to them that it will be submitted to the court for signing if no written objections to its accuracy or completeness are filed with the court clerk within 7 days after service of the notice. The party must file with the court clerk the original of the proposed judgment or order and proof of its service on the other parties.
>
> (a) If no written objections are filed within 7 days, the clerk shall submit the judgment or order to the court, and the court shall then sign it if, in the court's determination, it comports with the court's decision. If the proposed judgment or order does not comport with the decision, the court shall direct the clerk to notify the parties to appear before the court on a specified date for settlement of the matter.
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> ***
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> (c) The party filing the objections must serve them on all parties as required by MCR 2.107, together with a notice of hearing and an alternate proposed judgment or order.

At a hearing on July 18, 2008, Judge Power orally placed the holding in the divorce action on the record. Defendant was present via telephone. At the end of the hearing the trial court found that the statutory ground of divorce had been established and indicated that plaintiff's attorney should submit a proposed judgment under the seven-day rule. Judge Power also stated the defendant would have the opportunity to object to the order, and after reviewing any objections, the trial court would then consider signing the order. Defendant indicated that being that he was in prison, seven days would not be enough time to file objections to the proposed order. The trial court stated that defendant could have 14 days to file any objections. On August 4, 2008, defendant filed "Objection to the Orally Proposed Final Judgement [sic] of July 18, 2008 and Counter Proposal." Two days later, on August 6, 2008, plaintiff submitted her proposed judgment of divorce after trial. On August 21, 2008, defendant filed an objection to the proposed order, a document listing his proposed amendments to plaintiff's proposed order as his alternate proposed judgment, and a notice of hearing under MCR 2.602(B)(3)(c).

On August 25, 2008, Judge Power signed plaintiff's proposed judgment of divorce. The trial court also issued the following opinion and order:

> This matter comes before the Court upon the submission by Plaintiff of a proposed Judgment of Divorce After Trial, the Defendant having filed a thirty-one page Objection, and the Court having reviewed the proposed Judgment and the Objection.
>
> The undersigned noted that the Objection fails to state in what ways the proposed Judgment does not comport with the Court's decision from the bench on July 18, 2008, but rather he argued various issues connected with the divorce. The Court finds that the Judgment, as submitted by Plaintiff, accurately reflects

> the Court's decision from the bench. The Judgment will be entered as the Judgment of this Court.
>
> Under MCR 2.613(A):
>
> [a]n error . . . or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

We have reviewed the proposed judgment submitted by plaintiff, and like the trial court, find that it accurately represented the language of the trial court's underlying July 18, 2008 oral opinion from the bench. Defendant's lengthy objections to the order simply reargued issues related to the substance of the divorce. As such, defendant has not demonstrated that a failure to set aside this judgment would be inconsistent with substantial justice. MCR 2.613(A). Further, because the trial court found defendant's objections without merit and that plaintiff's proposed opinion comported with the oral ruling from the bench, Judge Power was not required to grant defendant's motion for a hearing on the matter. MCR 2.602(B)(3)(a). There was no evidence of deep-seated favoritism or antagonism toward defendant demonstrated in this ruling. Defendant has not shown error requiring judicial disqualification.

D.

Defendant next argues that Judge Power should have been disqualified because defendant requested a post-judgment bond hearing which the trial court granted, however, at the time of the hearing it changed the substance of the hearing to a stay hearing without prior notice to defendant. This argument is completely without merit. Defendant filed a motion on September 19, 2008 entitled "Motion [for] Determination of Appeal Bond and Issuance of Appeal Bond." Within the body of the motion defendant argues that the point of his motion is that he is ultimately seeking a stay. Indeed, the trial court held a hearing on October 21, 2008 on defendant's motion and defendant participated by telephone. At the end of the hearing the trial court granted defendant's motion for stay with two exceptions allowing for liquidation of an IRA and sale of a property in order for plaintiff to meet immediate credit card obligations. Defendant argues that he was not prepared for the hearing and therefore he suffered great prejudice, but in fact defendant was granted the remedy he requested. There was no evidence of deep-seated favoritism or antagonism toward defendant demonstrated in this ruling. Defendant has not shown error requiring judicial disqualification.

E.

Finally, defendant argues that Judge Power should have been disqualified as a result of cumulative error. Defendant specifically contends that the trial court chose not to "inject fairness and equity" into the trial "at every turn." In determining the effect of error, only actual errors are aggregated to determine their cumulative effect. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999). Because no errors exist, any argument regarding the cumulative effect of errors is misplaced and does not show error requiring judicial disqualification.

III

A.

Next, defendant argues that the trial court erred when it alienated defendant from his navy pension because it exceeded the statutory maximum. Plaintiff responds that the trial court properly granted her 50% of defendant's monthly navy pension as a property award and 15% as permanent non-modifiable spousal support, thus the 65% award does not exceed the statutory maximum. Questions involving statutory interpretation present questions of law subject to de novo review. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009).

With regard to "Insurance, Pension, Profit Sharing Statutory Pension Annuity and/or Retirement Benefits," the trial court held as follows in pertinent part:

> IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff shall receive as a property award, 50% of Defendant's United States Navy monthly retirement pursuant to the Uniform Services Former Spouses Protection Act (USFSPA), 10 USC 1408. Plaintiff and Defendant were married more than 10 years during which time Defendant was a member of the United States Navy and has more than 10 years of creditable military service during the marriage.
>
> IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff shall receive an additional 15% of Defendant's United States Navy monthly pension as permanent, non-modifiable, spousal support, as noted infra. Therefore, Plaintiff shall receive a total of 65% of Defendant's monthly United States Navy Pension for the remainder of Defendant's life, which she may enforce through a separate garnishment, if necessary.

At the divorce trial, plaintiff presented testimony from Charles Lerchen, the Director of Veteran's Affairs for Grand Traverse and Leelanau counties in Michigan. Lerchen testified that on the divorce of the parties in this case, plaintiff, as the former spouse, would be entitled to receive 50% of defendant's military pension. He further testified that a spousal support award to the former spouse could amount to no more than an additional 15% of defendant's navy pension. Plaintiff also provided a letter dated April 18, 2008, to plaintiff's attorney, from the Department of Defense, Defense Finance and Accounting Office stating as follows in relevant part:

> This is in response to your letter of March 5, 2008, inquiring about the Uniformed Services Former Spouse's Protection Act, 10 U.S.C. Section 1408 or FSPA.
>
> The Act does allow for the former spouse of a military retiree to apply to the Department of Defense to receive either a portion of the retired pay awarded to her in either a divorce or legal separation, or child support or alimony and or any combination of the three including all three. As long as she was married to the military member a minimum of 10 years while he was either on active or reserve duty for 10 years.

> Under FSPA [the] maximum a former spouse can receive is 50% be it community property, child support, alimony or all three. If there is a separate garnishment order for either the child support or the alimony un [sic] 42 U.S.C. 659, then the maximum that can be withheld would increase to 65%.

Indeed, the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 USC 1408, recognizes the right of state courts to distribute military retired pay to a spouse or former spouse and provides a method of enforcing these orders through the Department of Defense.

> [O]n June 26, 1981, the United States Supreme Court issued its opinion in *McCarty v McCarty*, 453 US 210; 101 S Ct 2728; 69 L Ed 2d 589 (1981), holding that a military pension was not divisible as a marital asset upon divorce. On September 8, 1982, Congress passed remedial legislation, entitled the Uniformed Services Former Spouses' Protection Act, 10 USC § 1408 et seq, effective February 1, 1983, and made retroactive to the day before *McCarty* was decided. [*Tomblinson v Tomblinson*, 183 Mich App 589, 591; 455 NW2d 346 (1990).]

The USFSPA contains its own jurisdictional requirement. 10 USC 1408(c)(4). It also requires that the parties must have been married for at least 10 years while the member performed at least 10 years of active duty service before a division of retired pay is enforceable under the USFSPA. 10 U.S.C. § 1408(d)(2). It further requires that an award of a portion of a member's retired pay as property must be expressed in dollars or as a percentage of disposable retired pay. 10 USC 1408(a)(2)(C). Defendant does not challenge these requirements.

Defendant challenges only the amount of his retired pay the trial court awarded plaintiff asserting that the trial court exceeded the statutory maximum. The USFPA limits the amount of the member's retired pay that can be paid to a former spouse to 50% of the member's disposable retired pay. 10 USC 1408(e)(1). In Michigan, pursuant to MCL 552.18(1),

> Any rights in and to vested pension, annuity, or retirement benefits, or accumulated contributions in any pension, annuity, or retirement system, payable to or on behalf of a party on account of service credit accrued by the party during marriage shall be considered part of the marital estate subject to award by the court under this chapter.

Thus, the trial court properly divided defendant's military retired pay as marital property and did not err when it awarded plaintiff 50% of defendant's monthly retirement benefit as a property award. 10 USC 1408(e)(1); MCL 552.18(1).

Additionally, Title 42 of the United States Code, Public Health and Welfare, Section 659 authorizes the pay of active, reserve, and retired members of the military and the pay of civilian employees of the federal government to be garnished for the payment of child and/or spousal support. 42 USC 659.[3] Under 42 USC 659(a) monies due from the United States to an

[3] The implementing regulation is found at 5 CFR Part 581.

individual may be garnished in accordance with state law to enforce the individual's support obligations. Here, the trial court awarded plaintiff an additional 15% of defendant's monthly retired pay as "permanent, non-modifiable, spousal support." This was not error because in cases such as this one where there are payments both under the USFSPA and pursuant to a garnishment for child support or alimony under 42 USC 659, the total amount payable cannot exceed 65% of the member's disposable retired pay. 15 USC 1673(b)(2)(B).[4]

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[4] 15 USC 1673 provides for restrictions on garnishment and states as follows:

> (a) Maximum allowable garnishment
>
> Except as provided in subsection (b) of this section and in section 1675 of this title, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed
>
> (1) 25 per centum of his disposable earnings for that week, or
>
> (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a)(1) of Title 29 in effect at the time the earnings are payable,
>
> whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).
>
> (b) Exceptions
>
> (1) The restrictions of subsection (a) of this section do not apply in the case of
>
> (A) any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review.
>
> (B) any order of any court of the United States having jurisdiction over cases under chapter 13 of Title 11.
>
> (C) any debt due for any State or Federal tax.
>
> (2) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed--

(continued…)

In sum, in order to remain under the statutory maximum of 65% pursuant to 15 USC 1673(b)(2)(B), the maximum share of defendant's retired pay that the trial court could award plaintiff as her share of marital property was 50%, 10 USC 1408(e)(1); MCL 552.18(1), and the maximum the trial court could award to plaintiff in spousal support was an additional 15%, 42 USC 659. Because the trial court did not exceed the statutory maximum in either the property award or the spousal support award, defendant has not shown error.

B.

Defendant also argues that the trial court erred when it deprived him of his unassignable VA disability benefits. With regard to "Defendant's Veterans Disability Benefit," the trial court held as follows:

> IT IS FURTHER ORDERED AND ADJUDGED that Defendant shall continue to allow one-hundred percent (100%) of Defendant's monthly Veteran's Administration Disability benefits to be deposited into an account at Members Credit Union for the support and maintenance of Plaintiff, the parties' minor children, and the marital home, and until such time Defendant is released from incarceration from the Michigan Department of Correction. This is pursuant to Uniform Services Former Spouses' Protection Act (USFSPA) 10 USC 1408. The funds shall continue to be directly deposited into the Members Credit Union account. Plaintiff has the right to transfer any funds to an account in Plaintiff's name. At such time when Defendant is released from incarceration, Defendant shall receive his Veterans Disability benefits solely.

(…continued)

> (A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and
>
> (B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;
>
> except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek.
>
> (c) Execution or enforcement of garnishment order or process prohibited
>
> No court of the United States or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section.

Clearly, the trial court erred in its Judgment of Divorce After Trial when it stated that its decision regarding defendant's disability benefits was based on 10 USC 1408. As discussed in detail in the previous section, 10 USC 1408 applies to military retirement pay and not disability benefits. Defendant is correct in his citation of 38 USC 5301 in support of his argument that his disability benefits are generally not assignable. 38 USC 5301(a)(1) applies to the nonassignability and exempt status of these benefits and states as follows:

> Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity.

However, in the case of incarceration of the veteran, a veteran's disability compensation may be apportioned to the dependents of the veteran. 38 USC 5313(b)(1); 38 CFR 3.665(e)(1). Thus, the trial court did not err when it directed that for the period of defendant's incarceration, defendant's disability benefits were to be apportioned for the support and maintenance of defendant's dependent minor children. But to the extent those disability benefits were apportioned for the support and maintenance of plaintiff who was no longer a dependent post-divorce, the trial court erred. The purpose of the federal exemption for VA benefits in 38 USC 5301 is to "protect funds granted by the Congress for the maintenance and support of the beneficiaries thereof." *Porter v Aetna Casualty & Surety Co.*, 370 US 159, 162; 82 S Ct 1231; 8 L Ed 2d 407 (1962). After the divorce, plaintiff was no longer a beneficiary. We therefore vacate that portion of the trial court's Judgment of Divorce After Trial and remand for an accounting of defendant's VA benefits used for plaintiff's support during the period of incarceration post-divorce and direct that those funds be retuned to defendant. Because the trial court ordered that after defendant's release from prison he was to receive his Veterans Disability benefits exclusively, there is no further violation of 38 USC 5301(a)(1) following his incarceration period.

IV

Defendant next argues that the trial court's property division was inequitable. As this Court has previously explained:

> In granting a divorce judgment, the trial court must make findings of fact and dispositional rulings. The trial court's factual findings will not be reversed unless they are clearly erroneous, i.e., if this Court is left with the definite and firm conviction that a mistake has been made. If this Court upholds the trial court's findings of fact, it must then decide whether the dispositional ruling was fair and equitable in light of those facts. The trial court's dispositional ruling is discretionary and will be affirmed unless this Court is left with the firm

> conviction that it was inequitable. [*Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005) (internal citations omitted).]

"This Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses." *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997).

The first step in dividing property in a divorce proceeding is determining which assets are martial property and which assets are separate. *Reed, supra* at 265 Mich App 150. Martial property is that which came to either party because of the marriage. *Reeves v Reeves*, 226 Mich App 490; 575 NW2d 1 (1997). A court's goal when allocating marital property is to divide it equitably between the parties. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). A court need not achieve mathematical equality when dividing marital property, but should clearly explain any extreme divergence from congruence. *Id*. at 114-115. When dividing the estate, a court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health, and needs, fault or past misconduct, and any other equitable circumstance. *Sparks v Sparks*, 440 Mich 141, 159; 485 NW2d 893 (1992). Each of these factors need not be given equal weight as their relevance will vary from case to case. *Id*.

At trial, both parties introduced evidence to prove the other was at fault for the breakdown of the marriage. The trial court found that in this long-term marriage there had been incidents of physical abuse by defendant against plaintiff, one of which defendant admitted, and that there was evidence regarding the possibility of past acts of infidelity on the part of defendant. But the trial court found that neither of these were the cause of the breakdown of the marriage. The trial court focused on defendant's "seducing and photographing by the Defendant of his then 16-year-old . . . step-niece, who had just arrived in this country." The trial court noted the fact that one of the parties' sons found the photographs defendant had taken of defendant's sexual activities with the minor step-niece. The trial court also found important that defendant continued email or chat conversation with the minor step-niece "right up to the point of him going off to prison" while the parties were still married. For these reasons, the trial court found defendant as "totally" at fault for the breakdown of the marriage and stated it was "very profoundly extensive fault."

Defendant supports his argument in his brief on appeal with the following statement, "[d]efendant's behavior was admittedly wrong but it isn't like the news hasn't been flooded with hundreds of young woman [sic] with a mind of their own taking and sending nude photos." "Fault is a legitimate consideration in arriving at a property division in a divorce matter." *Burkey v Burkey*, 189 Mich App 72, 78; 471 NW2d 631 (1991). Here, defendant's behavior was without a doubt atrocious, shocking, and plainly criminal. And, it, without a doubt led directly to the divorce of the parties. Again, this Court gives "special deference to a trial court's findings when they are based on the credibility of the witnesses." *Draggoo, supra* at 223 Mich App 429. The trial court did not clearly err when it decided defendant was at fault for the breakdown of the marriage.

When distributing the marital property, the trial court considered all relevant *Sparks* factors. *Sparks, supra* at 440 Mich 159. The trial court found that the parties had been in a long-term marriage and that during the marriage defendant had a career in the United States Navy.

The trial court found that plaintiff contributed to the marriage largely as a stay-at-home mother caring for the parties' two children and that she also held various part-time jobs throughout the marriage. The trial court found that defendant was retired from the Navy after more than 20 years of service and that he had been adjudged 100% disabled by the Department of Veterans Affairs. The trial court stated that it had "reservations" about the disability determination because defendant had gone back to school and received a degree. However, because the parties stipulated that defendant was disabled and unable to work, the trial court accepted the stipulation. The trial court noted no health concerns with regard to plaintiff and that she had acquired a teaching certificate, had been working part-time as a substitute teacher, and was looking diligently for full-time employment as a teacher for a number of years. The trial court found that defendant's navy retired pay was $1,800 a month and his VA disability pay was $2,900 a month. The trial court found it unfair to impute a full-time teacher salary to plaintiff because she had been unable to find employment as a full-time teacher in the area despite her best efforts.

The trial court explained that although 65% is "a high assessment for fault," the egregiousness of defendant's actions resulting in a felony conviction and his incarceration led directly to the breakdown of the marriage and justified the lack of congruence in the allocation of marital property. *Byington supra* at 224 Mich App 114-115. Further support for the equitable nature of the distribution is that while plaintiff received 65% of the parties' marital assets, she also received 65% of the parties' marital debt including significant mortgage and credit card debt.

Additionally, in its distribution of property, the trial court found significant the fact that both defendant's answer to complaint for divorce, dated December 24, 2007, and his counter complaint for divorce of the same date, specifically state that the trial court should grant "Support not to exceed 65% of Defendant's net income and end upon the death of either the Plaintiff or Defendant." A defendant may not assert that an error requires reversal if the error arose from actions to which he "contributed by plan or negligence," *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003), disapproved in part on other grounds 469 Mich 967 (2003), nor may a defendant advocate a position before the trial court and argue on appeal that the decision in his favor resulted in error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001).

After reviewing the record we find no clear error in the trial court's distribution of the marital property. Under the circumstances, plaintiff demonstrated a special need for additional funds and moreover demonstrated that general principles of equity demand she be given more than half the marital estate.

V

Defendant presents three more issues in his "Statement of Questions Presented" in his brief on appeal. However, defendant did not include arguments supporting these assignments of error in the argument section of his appellate brief. He stated that he removed the argument section due to the fifty-page limit of MCR 7.212(B) with regard to the length of briefs to the Court of Appeals. Without arguments, we simply cannot review these issues. It is the appellant's obligation to do more than simply announce a position or assert an error. He must discuss the basis of the trial court's ruling, *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004), and "adequately prime the pump" for the appellate well to flow

by explaining the basis of his arguments, supported with citations to relevant authorities, *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction. Costs to neither party.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray