STATE OF MICHIGAN

COURT OF APPEALS

FRANK QUANDT,

Plaintiff-Appellant,

v

SHELLEY MARIE QUANDT,

Defendant-Appellee.

UNPUBLISHED
April 20, 2010

No. 288864
St. Clair Circuit Court
LC No. 07-001189-DO

Before: M.J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Plaintiff appeals as of right the property settlement provisions of a divorce judgment. We affirm in part and reverse in part.

The parties were married on August 14, 1977, and a judgment of divorce was granted on October 23, 2008. In the interim period, the parties obtained a judgment of separate maintenance on August 27, 1998, which details issues pertaining to custody, support and a property settlement. Plaintiff's contention on appeal is that the trial court erred in the distribution of real property through the judgment of divorce because it is not consistent with the terms of the separate maintenance agreement.

The separate maintenance agreement specifically addressed the disposition of the marital home, located at 14882 Turner Road in Lynn Township, requiring its sale following the youngest child of the parties attaining the age of 18 years or graduation from high school. Until that time, defendant was to have exclusive possession and, as of July 9, 1998, "be solely responsible for paying all payments due thereon." However, the parties were ordered to "equally share the costs of major repairs," defined as those in excess of $500, and to mutually agree on the "person or entity" hired to effectuate such repairs. The home was to be sold, if neither party elected to buy out the other's interest in the property, on the public market to the "highest and best likely bidder." Following the sale, the separate maintenance agreement delineated a specific formula to calculate each party's share of the net proceeds, which was structured to account for payments made during the term of the land contract on the property in accordance with months of residency. Notably, in 2001, after entry of the separate maintenance agreement, the parties obtained a $76,000 mortgage on the marital home, which was reportedly used to pay off the land contract on the property and a credit card debt owed by plaintiff, along with the effectuation of major repairs to the marital home and other expenses.

In addition, the separate maintenance agreement included a provision for the waiver of defendant's dower rights upon payment of the sum of one dollar by plaintiff. Plaintiff was also awarded "all right title and interest in L & M Steel Fabricating, Inc., a Michigan corporation (and/or any of its corporate stock, assets, lands, buildings and contract rights) held or acquired by the [Plaintiff] either before his marriage to [Defendant] or after their marriage . . . free and clear of any past, present or future claim of right, title or interest by [defendant]."[1] The separate maintenance agreement contained no reference to additional real estate, identified as 13250 Hough Road in Belleville, Michigan and an 80-acre parcel located in Avoca, Michigan, obtained by plaintiff and his four siblings during the term of his marriage to defendant and before the parties' legal separation.

Plaintiff initiated an action for divorce on May 14, 2007. Disputes arose regarding defendant's rights regarding the real properties located on Hough Road, Havenridge Road and in Avoca. In addition, plaintiff claimed that the mortgage on the marital home was to be set off exclusively against defendant's share of the net proceeds upon sale of the property. Defendant did not specifically seek an alteration in the calculation of the proceeds of the sale of the marital home, but alleged that the parties were equally liable for the outstanding mortgage balance and alleged that plaintiff owed her additional monies pursuant to the separate maintenance agreement, including but not necessarily limited to: (a) child support arrearages, (b) one-half of an IRA valued at $18,700, (c) contribution to tax liabilities, (d) a percentage of dental costs incurred for one of the parties' minor children and (e) the cost of various improvements to the marital home. Following a bench trial, the court, relying on its equitable powers, awarded the parties equal shares of the net proceeds following sale of the marital home. In addition, defendant was awarded a one-half share of plaintiff's interest in the three additional parcels located on Hough Road, Havenridge Road and the Avoca property.[2] The trial court declined to address defendant's claims regarding plaintiff's contribution to various improvements to the marital home due to the insufficiency of the evidence delineating "the nature of cost of these expenditures."

"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) (citation omitted). For matters pertaining to the division of property, the appellate standard of review is comprised of two steps. First, this Court is required to 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 deemed to be clearly erroneous if, following a review of all of the evidence, an appellate court is left with a definite and firm conviction that a mistake has occurred. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Special deference is given to findings by a trial court when they are premised on the credibility of witnesses. *Id.* Next, if the trial court's

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[1] The building housing L & M Steel is located at 59320 Havenridge Road, New Haven, Michigan.

[2] The trial court made no reference to defendant's claims regarding other monies owed pursuant to the separate maintenance agreement. Because defendant has not appealed this ruling, this Court will not address these claims.

findings of fact are upheld, we must determine whether the dispositive ruling was fair and equitable in light of those facts. *Sparks*, 440 Mich 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). Factors that may be considered relevant to the determination of an equitable property distribution include, but are not necessarily limited to:

> (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 . . . . The determination of relevant factors will vary depending on the facts and circumstances of the case. [*McDougal*, 451 Mich at 89 (citations omitted).]

"The trial court is given broad discretion in fashioning its rulings and there can be no strict mathematical formulations." *Id.* at 88. However, "while the division need not be equal, it must be equitable." *Id.* For a distribution of marital assets to be deemed equitable, they should be fairly equivalent. Any significant departure from such equivalence should be clearly explained by the trial court with supporting rationale. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

Complicating this matter is the existence of the judgment of separate maintenance entered into by the parties approximately ten years before their actual divorce.[3] "Judgments entered pursuant to the agreement of parties are of the nature of a contract." *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). Because a postnuptial agreement is construed as a contract, this Court's review is conducted in accordance with rules of contract interpretation and construction. *Ransford v Yens*, 374 Mich 110, 113; 132 NW2d 150 (1965). Recently, in *Lentz v Lentz*, 271 Mich App 465, 471; 721 NW2d 861 (2006), this Court enforced a settlement agreement, created in anticipation of a divorce, noting, "[g]enerally, contracts between consenting adults are enforced according to the terms to which the parties themselves agreed." Accordingly:

> A contract must be interpreted according to its plain and ordinary meaning . . . . [Our] Supreme Court [has] emphasized that courts must construe unambiguous contract provisions as written. "We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions." [Our] Supreme Court [has] stressed that contracts must be enforced as written: "[W]hen parties have freely established their mutual rights and

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[3] "Postnuptial agreements made during an existing separation are thought to further judicial policy favoring settlement of controversies over litigation." *Rockwell v Rockwell*, 24 Mich App 593, 596; 180 NW2d 498 (1970) (citation omitted).

> obligations through the formation of unambiguous contracts, the law requires this Court to enforce the terms and conditions contained in such contracts, if the contract is not 'contrary to public policy.'" Parties may elect to include a written-modification clause in a contract, but with or without such a clause, "the principle of freedom to contract does not permit a party *unilaterally* to alter the original contract." [*Holmes v Holmes*, 281 Mich App 575, 593-594; 760 NW2d 300 (2008) (internal citations omitted, emphasis in original).]

In reviewing the trial court's distribution of the Avoca and Hough Road properties we note that these parcels were not addressed or even acknowledged to exist in the judgment of separate maintenance. Technically, the distribution of the sale proceeds from the Hough Road property is rendered moot as one-half of the net proceeds of plaintiff's share of this property was directly paid to defendant at the time of sale in 2005 and plaintiff did not seek legal intervention at that time. With reference to the Avoca property, it is undisputed the parcel was obtained during the marriage and before entry of the judgment of separate maintenance. While the original intent was to develop this property into a trailer park, those plans were abandoned and the parcel remains vacant. As this property is a marital asset, having been acquired during the term of the parties' marriage, the failure to include it within the separate maintenance agreement supports the trial court's award of one-half interest of plaintiff's share of the property to defendant as silence does not constitute a waiver. As defined by our Supreme Court in *Kelly v Allegan Co Circuit Judge*, 382 Mich 425, 427; 619 NW2d 916 (1969), "[a] true waiver is an intentional, voluntary act and cannot arise by implication. It has been defined as the voluntary relinquishment of a known right." In other words, "conduct that does not express any intent to relinquish a known right is not a waiver, and a waiver cannot be inferred by mere silence." *Moore v First Security Cas Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997). Because these properties were not contained in the judgment of separate maintenance and were marital assets, the trial court properly distributed these parcels on an equitable basis. Plaintiff, by failing to raise a specific argument or provide any evidence regarding the appreciation of these properties during the parties' separation or the lack of defendant's contribution to such appreciation, has waived any basis for further consideration or remand of this issue by the trial court.

Next, we address the marital home. Although the parties agreed to a specific distribution in the separate maintenance agreement, this was, in effect, superseded by having subsequently jointly obtained a mortgage on the property. Although plaintiff contends a separate agreement existed requiring the mortgage debt to be offset solely against defendant's share of the property, he was unable to provide any documentary evidence of such an agreement.[4] Initially, we would note that both parties have created a joint obligation for repayment of the mortgage through their agreement with the lender. This Court cannot rewrite the parties' contract with the mortgage company or subsequently alter their obligations to this third party. "This Court has long recognized that the jurisdiction of a divorce court is strictly statutory and limited to determining

[4] Plaintiff submitted only an unsigned document, which was insufficient to obligate defendant solely on the mortgage debt. There was no evidence of any such agreement with the mortgage company.

'the rights and obligations between the husband and wife, to the exclusion of third parties . . . .'" *Estes v Titus*, 481 Mich 573, 582-583; 751 NW2d 493 (2008) (footnote omitted). Having eliminated the land contract as a basis for the calculation of the parties' interest in the real property through the acquisition of the mortgage, there exists no reason to follow the previously structured distribution scheme. Because the parties have voluntarily altered their initial agreement involving the land contract on the marital home and have entered into a revised financial arrangement with a third party, the trial court correctly recognized this joint obligation impacting the property and distributed any remaining net proceeds from the sale of the home equally between the parties.

Next, we address the Havenridge Road property that is the situs for L & M Steel. In the judgment of divorce, the trial court distributed plaintiff's interest in this property on an equal basis with defendant. Plaintiff contends this is error based on the language of the separate maintenance agreement pertaining to L & M Steel as an asset, along with defendant's release of her dower rights and the law pertaining to partnerships. Initially, we find that plaintiff's argument pertaining to dower, in addition to misconstruing the concept of dower, is waived based on his failure to elaborate or provide any argument in support of his contention. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Korth v Korth*, 256 Mich App 286, 294; 662 NW2d 111 (2003) (internal citation and quotation marks omitted). Further, although plaintiff cites to partnership law to preclude the trial court's disposition of this parcel, he fails to provide any evidence that ownership of the property was consistent with a formal partnership agreement. As such, this argument is unavailing.

Unfortunately, the record is unclear regarding the Havenridge Road property. Evidence exists that plaintiff and his siblings own the property, in equal shares. The record also contains evidence that federal and state tax liens exist against L & M Steel on this parcel for unpaid taxes. The separate maintenance agreement specifically provided an award to plaintiff of "all right, title and interest in L & M Steel Fabricating . . . (and/or any of its corporate stock, assets, lands, buildings and contract rights)." In awarding defendant a one-half interest in this property, the trial court failed to explain its reasoning in light of the prior agreement regarding the buildings and land associated with this asset. Therefore, we remand for further clarification of this portion of the award.

Affirmed in part, reversed in part and remanded to the trial court for further action consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder