

STATE OF MICHIGAN
COURT OF APPEALS

JEREMIAH VINCENT ORIEDO,

Plaintiff-Appellant,

v

LYDIA NYABUL-ORIEDO,

Defendant-Appellee.

UNPUBLISHED

April 22, 2010

No. 288432

Midland Circuit Court

LC No. 07-002417-DO

BEFORE: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Plaintiff Jeremiah Vincent Oriedo appeals from a judgment of divorce that divided the marital estate on a 60/40 basis in favor of defendant. We affirm.

I. BIGAMY

Plaintiff argues that the trial court erred by failing to hold an evidentiary hearing to address his claim that defendant was already married to someone else when the parties were married in Texas in 1994, and by denying his post-trial motion for relief from the trial court's findings on the basis of this issue. We disagree.

A trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion. *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002). A trial court's decision on a motion for a new trial is also reviewed for an abuse of discretion. *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 655; 625 NW2d 40 (2000). An abuse of discretion occurs only when the trial court's decision is outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

A trial court is not required to hold an evidentiary hearing in every instance. *Bielawski v Bielawski*, 137 Mich App 587, 592; 358 NW2d 383 (1984). In deciding whether to hold an evidentiary hearing, "a court should first determine whether there exists contested factual questions that must be resolved." *Id.* Where there are no "meaningful contested factual questions that would require a hearing," an evidentiary hearing is not required. *Id.* at 592-593.

Though a bigamous marriage is void in both Michigan and in Texas, see MCL 552.1; Texas Fam Code Ann, § 6.202(a) (Vernon), plaintiff did not raise this issue prior to the trial. At trial, plaintiff asserted, for the first time, that the parties' marriage was void for bigamy, because defendant was still married to someone else when the parties were married. Plaintiff also argued that the marriage was void because defendant allegedly was a first cousin. The trial court later determined that first-cousin marriages were not illegal in Texas in 1994 and, therefore, rejected plaintiff's claim that the marriage was void for that reason. The court did not further address the issue of bigamy and plaintiff did not raise the issue. At trial, defendant denied that she was married to someone else when she married plaintiff, and denied that she was ever married to Thomas Ogari, the father of her children. Defendant, who is from Kenya, also denied that having children with someone is considered a marriage under traditional Kenyan customs. Plaintiff did not present any contrary evidence on this issue.

After trial, plaintiff filed a motion for review or reconsideration of the trial court's finding, and also filed objections to defendant's proposed judgment. Neither plaintiff's motion nor objections raised the bigamy issue. Before plaintiff's motion or objections were heard, plaintiff filed a separate motion for relief from the trial court's findings on the ground that he had newly discovered evidence that defendant was married to Ogari at the time the parties were married. Plaintiff submitted two 1982 affidavits purportedly signed by defendant and Ogari, both of which stated that defendant and Ogari were married in January 1982. Plaintiff also submitted an affidavit purportedly signed by Ogari on August 17, 2008, reaffirming that he and defendant were still lawfully married. However, plaintiff did not request an evidentiary hearing in connection with his motion. Rather, it was defendant who requested an evidentiary hearing in her response to plaintiff's motion. Defendant's response denied the allegations of bigamy, asserted that the purported affidavits were fraudulent and forged, and demanded that an evidentiary hearing be held at which plaintiff would be required to produce Ogari if necessary to resolve this issue.

Under MCR 2.611(A)(1)(f), a party may move for a *new trial* on the basis of newly discovered evidence. Under MCR 2.612(C)(1)(b), a party may similarly move for *relief from judgment* on the basis of newly discovered evidence. To be entitled to relief from judgment under MCR 2.612(C)(b), a party needs to show that the newly discovered evidence "could not have been discovered in time to *move for a new trial* under MCR 2.611(B)." [Emphasis added.] Otherwise, the requirements of the two court rules are the same.

Here, plaintiff did not move for a new trial under MCR 2.611(A). Rather, he moved for relief from the trial court's *findings* under MCR 2.612(C), *before a judgment was entered*. Thus, any motion for relief from judgment would have been premature. Under the circumstances, we will treat plaintiff's motion as a motion for a new trial under MCR 2.611(A).

To be entitled to a new trial on the basis of newly discovered evidence, a party must show (1) that the evidence, not merely its materiality, is newly discovered, (2) that the new evidence is not cumulative, (3) that the evidence is likely to change the result, and (4) that the movant could not have, by the use of reasonable diligence, discovered and produced the evidence at trial. *South Macomb Disposal Auth, supra* at 655.

Although plaintiff briefly raised the bigamy issue at trial, he did not offer any evidence in support of his allegations. It appears that the two 1982 affidavits were not discovered until after trial. Because defendant denied the allegations of bigamy at trial, the affidavits are not cumulative of any other evidence previously offered. Plaintiff's new evidence, if proven to be true, also would make a different result probable on retrial. However, plaintiff failed to make any showing that he could not have obtained the new evidence, by the use of reasonable diligence, before trial. Indeed, plaintiff did not address this question or otherwise explain why he could not have discovered the evidence sooner. Moreover, the ages of the two 1982 affidavits and the fact that plaintiff was clearly aware of defendant's prior relationship with Ogari at the time of trial refutes the suggestion that plaintiff could not have obtained the new evidence before trial by the use of reasonable diligence.

Although plaintiff claims that under Kenyan tradition, a woman is automatically married to the father of her children, the evidence established that plaintiff had always been aware of defendant's two children from a prior relationship. Thus, plaintiff would have known about the alleged bigamy issue since the inception of the marriage, and should have been able to produce relevant evidence on the issue by the exercise of due diligence.

Because plaintiff failed to satisfy the due diligence prong of the newly discovered evidence test, an evidentiary hearing was not necessary and the trial court did not abuse its discretion in denying plaintiff's motion for relief.

II. INJUNCTION

Plaintiff argues that the trial court erred in enjoining him and those in active concert with him from contacting federal authorities with regard to defendant's immigration status. We disagree. A trial court's decision to grant injunctive relief is reviewed for an abuse of discretion. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008).

The trial court's injunction is directed at plaintiff and "his agents, servants, employees, and attorneys and those in active concert or participation with him who have actual or constructive knowledge of this Order." Because the order is not directed at federal authorities, preemption concerns are not implicated. See *People v Truong (After Remand)*, 218 Mich App 325, 330-332; 553 NW2d 692 (1996).

We also disagree with plaintiff's argument that the injunction was improper because there was no danger of irreparable harm or because defendant had an adequate remedy at law. "A divorce case is equitable in nature, and a court of equity molds its relief according to the character of the case; once a court of equity acquires jurisdiction, it will do what is necessary to accord complete equity and to conclude the controversy." *Dragoo v Dragoo*, 223 Mich App 415, 427-428; 566 NW2d 642 (1997) (citations omitted). Thus, the trial court here had the authority to order the parties to do whatever it deemed necessary to conclude the controversy and achieve complete equity. Still, an injunction is an extraordinary remedy that will be granted only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury. *Pontiac Fire Fighters Union*, 482 Mich at 8.

The record in this case is replete with instances of plaintiff's lying, manipulative, and abusive conduct. During the marriage, he repeatedly tormented defendant with threats of deportation. Defendant testified that plaintiff once called the embassy in Kenya and stated that his signatures on the visa petitions submitted by her children were fraudulent, which apparently caused the children to be denied visas and barred them from entering the United States or Canada. Plaintiff also used threats of deportation to thwart defendant's church attendance. The record sufficiently establishes an imminent danger that plaintiff (or those in active concert with him) would interfere with defendant's immigration status.

We are satisfied that justice requires the issuance of an injunction to prevent plaintiff from interfering in defendant's immigration matters. Although defendant may have due process rights in an immigration proceeding, she has no right of redress against plaintiff if he fraudulently caused her deportation. As argued by plaintiff, the trial court would be preempted from ordering federal authorities to desist from deporting defendant, or from ordering that she be readmitted if she were deported on the basis of allegations made by plaintiff. Thus, the injunction was properly designed to prevent irreparable harm for which there was no adequate remedy at law.

Accordingly, the trial court did not abuse its discretion in issuing the injunction.

III. DUE PROCESS

Plaintiff also says that the trial court violated his right to due process by limiting his testimony but not defendant's, by being discourteous, and by not allowing him time and privacy to change his oxygen tank. He also argues that the trial court deprived him of the right to counsel by refusing to adjourn the motion hearing after plaintiff's counsel withdrew. We disagree.

Constitutional claims of due process violations are reviewed de novo. *In re PAP*, 247 Mich App 148, 152; 640 NW2d 880 (2001). A trial court's ruling on a motion for an adjournment is reviewed for an abuse of discretion. *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996). Decisions concerning the scope of examination of witnesses and the presentation of evidence are also reviewed for an abuse of discretion. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 22; 697 NW2d 913 (2005). An abuse of discretion occurs only when the trial court's decision falls outside the range of "reasonable and principled outcome[s]." *Maldonado, supra* at 388.

MRE 611(a) allows a trial court to exercise reasonable control over the mode and order of the interrogation of witnesses and the presentation of evidence. Former MRE 611(c)¹ allowed

¹ After the trial in this case, MRE 611 was amended to add a new subsection (b). Thus, former subsection (c) now appears as subsection (d).

leading questions to be used during direct examination if necessary to develop a witness's testimony. Contrary to plaintiff's argument, the record discloses that the trial court imposed limitations on both parties, not just plaintiff. Unlike defendant, whose answers to questions were concise and responsive, plaintiff often digressed substantially, even after his attorney was granted permission to lead him. The limitations imposed by the trial court were reasonable. At no point did plaintiff's attorney object to the limitations, and there was no claim that he was unable to present testimony or evidence due to the trial court's time constraints. On appeal, plaintiff has not identified any evidence or testimony that he was not able to present. Thus, plaintiff has not demonstrated that the trial court abused its discretion by imposing limitations on plaintiff's testimony, or that the court's limitations deprived plaintiff of due process.

Plaintiff also complains that the trial court was rude and discourteous. He accuses the court of denying him time or privacy to change his oxygen tank. We find no merit to these claims. The record discloses that the trial court acted fairly and courteously, and took appropriate breaks to allow plaintiff to change his oxygen tank.

We also reject plaintiff's argument that the trial court deprived him of his constitutional right to counsel by refusing to adjourn the motion hearing after allowing his attorney to withdraw. A motion for an adjournment must be based on good cause, and may be granted to promote the interests of justice. *Soumis*, 218 Mich App at 32; see also MCR 2.503(B)(1) and (D)(1). In deciding whether to grant a continuance, the trial court should consider whether the party (1) was asserting a constitutional right, (2) had a legitimate reason for asserting the right, (3) was negligent in asserting the right, and (4) had requested prior adjournments. *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). On appeal, this Court must also consider whether the trial court's decision resulted in prejudice. *Id.*

Here, plaintiff was not asserting a constitutional right to counsel. There is no constitutional right to counsel in a divorce proceeding. See *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2001). Although plaintiff had a legitimate reason for requesting an adjournment (to obtain new counsel), his former attorney had made it clear that she intended to withdraw for at least two weeks before the motion hearing. Therefore, plaintiff was negligent in failing to secure new counsel before the hearing. Further, plaintiff was not prejudiced because his motions and objections had already been briefed and filed by counsel, and the court denied plaintiff's motions and objections for lack of merit, not because of plaintiff pro se performance. Under the circumstances, there was no error.

IV. PROPERTY DIVISION

Plaintiff also contends that the trial court committed several errors in its property division, including failing to award plaintiff his separate premarital property, dividing funds that belonged to plaintiff's son, and giving disproportionate weight to plaintiff's fault. We disagree.

Initially, we note that plaintiff did not include this argument in his statement of questions presented. MCR 7.212(C)(5). Therefore, it is not properly presented for appellate consideration.

VanderWerp v Plainfield Twp, 278 Mich App 624, 633; 752 NW2d 479 (2008). Nonetheless, plaintiff's arguments lack merit.

In divorce cases, an "appellate court must first review the trial court's findings of fact under the clearly erroneous standard." *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). Due "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Sparks, supra* at 148 n 5, quoting MCR 2.613(C). The reviewing court may not "substitute its judgment for that of the trial court; if the trial court's view of the evidence is plausible, the reviewing court may not reverse." *Beason, supra* at 805. "If the 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. Such rulings are "an exercise of discretion" which "should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable." *Id.* at 152.

A. SEPARATE PROPERTY

Plaintiff maintains that the trial court erred by failing to award him \$88,000 as his separate premarital property. We disagree.

In a divorce, a trial court may divide all property "that shall have come to either party by reason of the marriage." MCL 552.19. "Generally, the marital estate is divided between the parties, and each party takes away from the marriage that party's own separate estate with no invasion by the other party." *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). However, MCL 552.401 allows invasion of a party's separate estate when the evidence shows that the other party "contributed to the acquisition, improvement, or accumulation of the property." *Id.* at 494-495. "Assets earned by a spouse during the marriage are properly considered part of the marital estate." *Byington v Byington*, 224 Mich App 103, 110, 112; 568 NW2d 141 (1997).

In *Pickering v Pickering*, 268 Mich App 1, 12; 706 NW2d 835 (2005), the husband sought to recover nearly \$20,000 of separate funds that he contributed toward the purchase of the parties' first home. The parties lived in the home for approximately 15 years and paid for the mortgage and improvements using marital funds. *Id.* "The home was eventually sold, and the proceeds were reinvested in a new marital home that was jointly titled." *Id.* This Court held that the money was properly included in the marital estate because, under the circumstances, the trial court properly found that the plaintiff's alleged contribution lost any characteristic of being separate property. *Id.* at 12-13.

Here, plaintiff contributed \$18,000 in separate savings toward the purchase of the parties' first marital home in California. The proceeds of the sale of the California home were used to purchase the Michigan marital home. The funds were never kept separate. As in *Pickering*, plaintiff's original \$18,000 contribution lost any characteristic of being separate property and thus was properly included in the marital estate.

Plaintiff's \$70,000 signing bonus received from his employer as an incentive to be applied toward the purchase of a home was also properly included in the marital estate. The parties were married in 1994, and it is undisputed that plaintiff was obligated to repay the bonus if he left his employment before 1996 or 1997, well after the parties' marriage. In *Skelly v Skelly*, 286 Mich App 578; ___ NW2d ___ (2009), before entry of a judgment of divorce, the husband received two out of four installments of a retention bonus that was contingent on his remaining employed with the company until at least May 31, 2009, nearly a year after entry of the judgment. *Id.* at 579-580. The trial court included the entire bonus in the marital estate, but this Court reversed, finding that no part of the retention bonus was earned during the marriage because the husband remained obligated to pay the entire amount back if he left the company's employment before the appointed date. *Id.* at 580-581. Therefore, the bonus was not marital property. *Id.*

In the present case, the converse is true. While plaintiff became eligible for the bonus upon being hired, he did not purchase a home until after the marriage. Plaintiff remained obligated to pay back the entire amount of the bonus until 1996 or 1997, two or three years after the marriage. Thus, the bonus was earned during the marriage and was properly included in the marital estate.

B. DIVISION OF PROPERTY

Plaintiff argues that the trial court's decision to divide the marital estate on a 60/40 basis in favor of defendant was inequitable.

The division of property in a divorce action is not governed by "strict mathematical formulations"; rather, "while the division need not be equal, it must be equitable" in light of all the facts. *Sparks, supra* at 158-159. "[T]he following factors are to be considered wherever they are relevant to the circumstances of the particular case: (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." *Id.* at 159-160. The trial court "shall make specific findings of fact regarding those factors," but may not "assign disproportionate weight to any one circumstance." *Id.* at 158-159.

Plaintiff does not quarrel with the trial court's findings on most of the *Sparks* factors. The parties were in their mid to late forties, and had been married for approximately 12 years at the time of their final separation. Defendant was in good health while plaintiff was disabled to some extent. Plaintiff has a Ph.D. in chemistry, and defendant had just obtained a bachelor's degree in business. While plaintiff was the primary breadwinner during the marriage, defendant took care of the home and plaintiff's son. Thus, the trial court viewed their contributions to the marital estate as equal.

With respect to earning potential, the trial court found that plaintiff had the potential to earn twice as much as defendant. At the time of trial, plaintiff was receiving approximately \$5,624 in monthly disability benefits, or \$67,488 a year, plus supplemental benefits for the

support of his two children. Plaintiff's tax returns showed that he earned \$85,060 in 2002, \$87,486 in 2003, and \$117,769 in 2005. Conversely, defendant was receiving \$362 in biweekly unemployment benefits and was working part time at a department store, earning \$8.61 an hour (with irregular hours). Until her termination in April 2008, defendant had earned approximately \$45,572 a year working for her previous employer. The evidence supports the trial court's conclusion that plaintiff had the potential to earn twice as much as defendant.

The trial court rejected plaintiff's argument that defendant should not share in the marital estate because she had moved out of the marital home several times and refused to commingle her earnings with plaintiff's. The court found that plaintiff had dominated the relationship in every way imaginable, and had subjected defendant to all forms of abuse. The court found that: (1) defendant left the marital home to escape plaintiff's abuse; (2) that plaintiff failed to seek a divorce; and (3) plaintiff repeatedly enticed defendant's reconciliations with promises to do better.

Though a court may not place excessive weight on the factor of fault, *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996), fault is, nonetheless, a proper consideration, including whether the episodes demonstrate outrageous behavior rather than being examples of unfair and unfortunate conduct. *Id.* at 90.

Here, the record is replete with instances of plaintiff's outrageous financial, physical, emotional, and sexual abuse of defendant. Plaintiff withheld money from defendant, even for necessary expenses such as groceries. He initially refused to help her obtain permanent residence status so that she could work and support her children in Kenya. He broke his promise to help bring defendant's children to this country, and interfered with her ability to see and support them. There was also evidence that plaintiff regularly physically and sexually abused defendant, and repeatedly threatened to have her deported. Considering the frequency and magnitude of plaintiff's abusive conduct, the trial court did not give disproportionate weight to plaintiff's fault, and that factor, in conjunction with the other *Sparks* factors, amply justified the trial court's decision to divide the marital estate on a 60/40 basis in favor of defendant. Compare *Welling v Welling*, 233 Mich App 708, 711-713; 592 NW2d 822 (1999).

Plaintiff also claims that the trial court erred by granting defendant a credit of \$12,000 that she spent on fixtures for the marital home. We disagree. Defendant testified that the parties ordered their plumbing fixtures through her former employer to save money. Defendant produced pay stubs showing that the money was deducted from her paychecks. At approximately the same time, defendant's wages were garnished because plaintiff failed to pay rent on the parties' apartment after defendant and plaintiff's son moved out, and plaintiff inflicted considerable damage. Defendant's monthly pay was only \$11 for at least seven months, resulting in additional garnishments. Plaintiff repaid defendant for curtains and other items purchased for the marital home, as he had agreed, but did not repay her for the fixtures.

Under the circumstances, it was not inequitable to award defendant a \$12,000 credit for the cost of the fixtures for the marital home.

C. PLAINTIFF'S SON'S PROPERTY RIGHTS

Plaintiff argues that by dividing moneys deposited into his son's bank account, the trial court improperly adjudicated his son's property rights despite there being no allegations that plaintiff had colluded with his son to deprive defendant of her rightful share of the marital estate. We disagree.

In a divorce action, a trial court may not divide property owned by a third party absent allegations that the third party conspired with one of the spouses to deprive the other spouse of marital property or spousal support. *Przeklas v Przeklas*, 240 Mich 209, 210-213; 215 NW 306 (1927); see also *Thames v Thames*, 191 Mich App 299, 301-302; 477 NW2d 496 (1991).

In this case, the evidence clearly showed that plaintiff deposited his 2004 and 2005 tax refund checks into his own account and then transferred the money into his joint account with his son. Plaintiff did not provide support for his claim that he was repaying funds that he had previously borrowed from his son's account. Aside from a \$2,000 scholarship, which defendant did not contest, plaintiff also failed to provide verification that any of the funds remaining in the account belonged to his son. Contrary to what plaintiff argues, the trial court did not improperly resolve a disputed question of title. Rather, the evidence showed that plaintiff deposited the funds into his son's account in an attempt to hide marital assets. Thus, there is no merit to plaintiff's argument that the trial court improperly disposed of his son's money as a marital asset.

Affirmed.

/s/ Henry William Saad

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray