

STATE OF MICHIGAN
COURT OF APPEALS

RONALD TETLOFF,

Plaintiff-Appellee,

v

MARY L. DYSINGER, f/k/a MARY L.
TETLOFF,

Defendant-Appellant.

UNPUBLISHED
October 23, 2012

Nos. 301229, 301247
Clare Circuit Court
Family Division
LC No. 09-900605-DO

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

In these consolidated appeals, the parties appeal from their judgment of divorce. The parties are challenging the property division, the inclusion of gains and losses in a qualified domestic relations order (QDRO), and the court's award of attorney fees to defendant. We affirm the inclusion of the gains or losses language in the QDRO, but reverse and remand for further proceedings with respect to all other issues.

The parties married in 2002 and divorced in 2010. They have no minor children. At the time of trial, defendant was 49 years old and plaintiff was 56. The parties were able to resolve certain aspects of the divorce before trial, including two separate personal property agreements. However, the remaining assets, consisting primarily of property in Canada and various retirement accounts, was divided by the trial court after trial.

The trial court found that the net value of the parties' assets was \$389,000. It awarded plaintiff \$213,950 of the marital assets and awarded defendant \$175,050, with defendant's award to come from her pension, values from plaintiff's pensions, and \$23,678 in cash. Plaintiff's award consisted of the remaining assets. The portion of defendant's award coming from plaintiff's retirement accounts appeared to be a fixed amount in the judgment of divorce, but during the motion to submit the QDRO the trial court noted that it had accidentally omitted language allowing for the award to be subject to gains and losses incurred between the date of trial and the date the funds were segregated. The trial court also awarded defendant \$545 in attorney fees and costs.

Both parties challenge the trial court's decision on the division of property. Plaintiff argues that the division is inequitable in part because he owned a home prior to the marriage, had a greater income due in part because he worked large amounts of overtime, and contributed a

substantial amount of money to his retirement accounts. He also argues that the trial court failed to make specific findings of fact on all of the *Sparks*¹ factors. Defendant argues that while some of the trial court's findings of fact were clearly erroneous, for the most part, the findings were minimally sufficient. However, defendant argues that the trial court impermissibly relied on a single circumstance when dividing the estate, which resulted in an impermissible departure from congruence. We review the trial court's findings of fact for clear error. *McNamara v Horner*, 249 Mich App 177, 182; 642 NW2d 385 (2002). Factual findings are clearly erroneous if, after review of the entire record, we are left with the definite and firm conviction that a mistake was made. *Id.* at 182-183. We consider whether the trial court's ultimate disposition was fair and equitable in light of the court's factual findings. *Woodington v Shokoohi*, 288 Mich App 352, 365; 792 NW2d 63 (2010). We will reverse a dispositional ruling only when we are firmly convinced that the disposition was inequitable. *Id.*

In reaching a property division, a court must consider the following factors (the *Sparks* factors) if relevant to the circumstances of the case before it:

(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. [*Sparks*, 440 Mich at 159-160; see also *Berger v Berger*, 277 Mich App 700, 717; 747 NW2d 336 (2008) (observing that the trial court “must consider all relevant factors”).]

The trial court is not required to make findings of fact on every *Sparks* factor. *Sparks*, 440 Mich at 159. However, if “any of the factors delineated in this opinion are relevant to the value of the property or to the needs of the parties, the trial court *shall* make specific findings of fact regarding those factors.” *Id.* at 159 (emphasis added).

Here, the trial court's findings of fact on the *Sparks* factors were relatively short and abbreviated. The trial court found that the duration of the marriage was from July 2002 to December 2009, and that as of trial plaintiff was 56 years old, and defendant was 49 years old with only minor health issues. It found that because of her bankruptcy, defendant only brought her personal property to the marriage while plaintiff brought several assets. It found that both parties worked during the marriage, and although both made about the same wage per hour, plaintiff had earned 65 percent of the marriage income. It also found that plaintiff had earned twice as much as defendant during the marriage, but noted that defendant “was on workman's comp and unemployment for a while which accounts for some of the reduced earnings.” The trial court also found that the parties had equal earning power. From these findings it is clear that the trial court did make findings of fact on (1) the duration of the marriage, (2) contributions to the marital estate, (3) the age of the parties, (4) the health of the parties, and (5) the earning abilities of the parties.

¹ *Sparks v Sparks*, 440 Mich 141; 485 NW2d 893 (1992).

However, the court made no findings regarding the necessities and circumstances of the parties. Plaintiff earned about \$82,000 in 2008, and \$86,000 in 2009. Defendant earned around \$27,000 in 2008. Plaintiff owned a home prior to the marriage and had to pay home upkeep expenses. Defendant did not own a home, and now had to pay rent. Testimony also established that plaintiff had been paying for defendant's health insurance, and that defendant did not have health insurance available through her employers. After the divorce, defendant testified, she did not have any way to obtain health insurance if the trial court did not order COBRA.

Additionally the trial court made no findings of fact on the life status of the parties, even though there was testimony establishing that they differed. For example, plaintiff was near retirement age, but defendant was "a little farther" from being able to claim Social Security. There was testimony that plaintiff had been steadily employed for 35 years, but that defendant was unable to find full-time employment despite a multi-state job search.

The trial court also made no findings of fact on the past relations and conduct of the parties. The marriage was described by plaintiff as a "rollercoaster," and defendant testified that there were good times and bad times. Defendant testified that she did not expect to enter into a marriage where plaintiff would "pick and choose what he wanted to share in a marriage." Plaintiff testified that during the marriage it seemed that he "could never seem to do anything right." He said defendant would call him names, say mean things, and frequently talked about divorce, and defendant testified that she suspected plaintiff was cheating "again." Defendant testified that although plaintiff's sons were living in the home, he would not let her children and grandchildren visit.

Finally, the trial court's only finding regarding contributions to the marital estate was on what the parties had brought into the marriage. However, there is evidence that the parties shared most of the marital expenses. Specifically, the testimony showed that both parties contributed to utilities, bills, and property taxes and that defendant occasionally paid homeowners insurance. The record also establishes that defendant made improvements to the marital home and actively participated in the construction of the cabin the parties built on property in Canada. See *Woodington*, 288 Mich App at 366 (noting that contributions to the marital estate may be significant even when they are not monetary).

A trial court clearly errs when it fails to make specific findings of fact on relevant property division factors. *McNamara*, 249 Mich App at 185. Where there is evidence on the record regarding the *Sparks* factors on which the trial court did not make findings of fact where it should have, or the trial court only makes nonspecific findings of fact, it is appropriate to remand a case to the trial court to make further findings. *Id.* at 186-188. We do so now. Further, because the findings of fact are insufficient to facilitate our review, we are unable to consider whether the division of the marital estate was fair and equitable. On remand, we direct the trial

court to explain any departure from congruence in the division of marital assets. We also direct that the court clarify its findings regarding the credit card debt.²

Defendant argues that the trial court abused its discretion in awarding her only part of the attorney fees and costs she requested. This Court reviews the findings of fact on which the trial court based an award of attorney fees for clear error, and its ultimate ruling for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). A trial court abuses its discretion when its decision not to award attorney fees results in an outcome that falls outside the principled range of outcomes. *Ewald v Ewald*, 292 Mich App 706, 725; 810 NW2d 396 (2011).

A party may seek attorney fees if they are unable to afford the expense of a divorce action. MCL 552.13; MCR 3.206(C)(1). The party seeking attorney fees has the burden to establish both financial need and the ability of the other party to pay. *Ewald*, 292 Mich App at 724. The party seeking attorney fees must also allege sufficient facts to show that she cannot bear the expense of the action. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). The party seeking attorney fees must also establish the amount of the claimed fees and their reasonableness. *Ewald*, 292 Mich App at 725.

Defendant testified that she did not have the ability to pay all of her attorney fees and that she was receiving help from her mother to pay her fees. Defendant established that her income was most recently around \$27,000 and that plaintiff was earning approximately \$50,000 more than her. Defendant was not seeking and was not awarded spousal support. In awarding attorney fees, a trial court should consider the extent to which the parties have assets and income comparable to each other. *Gates v Gates*, 256 Mich App 420, 439; 664 NW2d 231 (2003). The trial court should also consider the amount of liquid assets the party requesting attorney fees received, and whether those assets are necessary to the party's support. *Woodington*, 288 Mich App at 370. "It is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Id.*

Here, the trial court determined that defendant was "getting enough assets to pay the rest of her attorney bill." However, the court did not indicate that it found that there was enough liquidity in those assets to allow for defendant to pay the fees incurred. It could be assumed that

² Plaintiff testified that there was a balance of between \$2,000 and \$2,200 on the joint credit card when defendant left. He testified that he had paid between \$2,000 and \$2,200 on the credit card, leaving the card with a "slight balance but it's mostly paid off." The trial court found that there was \$1,607 owed on a joint credit card, and that plaintiff had paid \$2,200 in joint credit card debt. The trial court ruled that "defendant is to be responsible for the joint credit card debt of \$1,607, and court is giving credit to plaintiff for the \$2,200 he paid on that debt."

It is not clear whether the trial court found that defendant was more fully responsible for incurring the credit card debt and therefore should be more fully responsible for its payment, or whether it thought that plaintiff had already paid \$2,200 in joint debt, but an amount of \$1,607 was left and defendant should be required to pay that amount. Clarification is warranted.

the court found that sufficient liquid assets were available that were not necessary for defendant's support, but this would be pure speculation. The court also failed to make findings of fact on defendant's need and the parties' abilities to pay. "Without adequate findings of fact, there is no basis for determining whether the trial court's award represented an abuse of discretion." *Id.* at 371. On remand, the trial court is instructed to make appropriate findings of fact and consider and rule on defendant's request for attorney fees based on its findings.

Finally, plaintiff argues that the trial court erred in including language allowing gains and losses to be included in the QDROs. Specially, plaintiff argues that the judgment of divorce merely specified a flat rate that defendant was to receive from plaintiff's retirement accounts.

MCR 2.612(A)(1) provides, "Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court *at any time* on its own initiative or on motion of a party and after notice, if the court orders it. (Emphasis added.) The recognized purpose of "MCR 2.612(A)(1) is to make the lower court record and judgment accurately reflect what was done and decided at trial." *Central Cartage Co v Fewless*, 232 Mich App 517, 536; 591 NW2d 422 (1998) (internal quotation marks and citations omitted).

Here, although the judgment of divorce does not include language allowing for gains and losses to be shared with defendant, the trial court stated in its ruling:

The Court is gonna grant the motion and enter the Qualified Domestic Relations Order.

The Court will set a valuation date as the trial date that was the date that . . . the Court used for making the decision and gathered the information so it's gonna be the trial date.

It will include gains and losses.

And that was just an oversight by the Court and not mentioning the valuation date and the gains and losses.

The trial court was clearly correcting an omission in the judgment of divorce, which is within the purview of MCR 2.612(A)(1).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Joel P. Hoekstra