

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH C. HARMAN,

Plaintiff/Counter-Defendant-
Appellee,

v

LAURA E. HARMAN,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED
June 19, 2012

No. 303180
Lapeer Circuit Court
LC No. 10-042774-DO

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right the trial court's division of property, award of spousal support, and decision to deny her claim for attorney fees in the judgment of divorce. Because we conclude that there were no errors warranting relief, we affirm.

Plaintiff and defendant married in 1966, but had been separated for 24 years by the time of trial. The trial court determined that the property should be divided as the parties had generally agreed, but clarified that the parties would keep their pensions free of any interest of the other party and specifically extinguished any survivorship interests.

At trial, plaintiff testified that he had been involved in extra-marital relationships before he left defendant to move in with his girlfriend, but claimed that these did not cause the marriage's breakdown. The trial court interrupted to ask if anyone intended to make the cause of the marital breakdown an issue, and defense counsel responded "[p]robably." The trial court told plaintiff's counsel to "[g]o ahead," and plaintiff resumed testifying about his extramarital affairs. While plaintiff's counsel was questioning plaintiff, she noticed that the parties' adult son was in the courtroom and asked the trial court if he could be asked to step out into the hallway, because he was a potential witness. The trial court asked defense counsel if he intended to call the son, and asked for an offer of proof on what the son would testify about. Defense counsel said "[w]hat his dad has done and not done the last 24 years since the parties have been separated Financial mostly." The trial court denied defense counsel's request to call the parties' son as a witness, stating it would instead hear from the parties on the financial matters and that it needed to divide their property and determine alimony "in a relatively efficient manner."

Plaintiff and defendant testified extensively about their respective incomes and expenses. Defendant also testified that she could not afford to pay her attorney fees, and asked the trial court to order plaintiff to pay \$2,500 in attorney fees. Defense counsel estimated that his fees were approximately \$7,000.

The trial court recognized that it needed to take several factors into account when awarding spousal support, but specifically decided not to take fault into consideration because the parties had been separated for 24 years. The trial court awarded spousal support primarily because of the income disparity of the parties, and because of defendant's health. The trial court considered the issue of attorney fees and determined that defendant failed to show financial need and plaintiff's ability to pay.

Defendant first argues that the trial court erred when it precluded her from presenting testimony about plaintiff's extramarital affairs. In her analysis of this issue, defendant does not cite any point at the trial where the trial court specifically precluded her from presenting evidence concerning fault or that plaintiff had had extramarital affairs. Indeed, the record shows that plaintiff actually testified about his affairs and, after defendant's trial counsel informed the court that fault would probably be at issue, the court permitted continued testimony on the affairs. Accordingly, to the extent that the trial court did not hear evidence on the parties' past relations and conduct from defendant, it was not because the trial court refused to hear the evidence. Rather, it was because defendant's counsel chose not to present additional proofs or arguments on fault. This Court will not reverse when the aggrieved party contributed to the alleged error by plan or negligence. *In re Utrera*, 281 Mich App 1, 11-12; 761 NW2d 253 (2008). Defendant also has not identified the substance of her son's proposed testimony or explained how it might have added to or clarified the evidence already before the trial court. Instead, she merely asserts that her son should "have been allowed to expound upon" the parties' testimony. Because this claim is so poorly supported on appeal, we decline to consider it. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.").

Defendant next argues that the trial court erred when it ordered plaintiff to pay spousal support without providing security in the form of a survivor's benefit in plaintiff's pension to cover the possibility that he might die before her. In her reply brief, defendant also disputes the trial court's division of the marital estate. Specifically, she argues that she owned title to the home on Churchill and, therefore, it was not marital property to be divided upon divorce.

As to the treatment of the Churchill home, we note that the trial court's division of the marital assets was made according to the parties' agreement. Accordingly, there is no error to review. See *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008). In any event, the fact that plaintiff had deeded the property to defendant at some earlier point did not necessarily preclude the trial court from finding that the property was marital property. See *Reed v Reed*, 265 Mich App 131, 155-156; 693 NW2d 825 (2005). Assets are not separate marital assets simply because they are owned by one spouse individually. *Cunningham v Cunningham*, 289 Mich App 195, 201-202; 795 NW2d 826 (2010). The Churchill property had been purchased during the marriage. Plaintiff quitclaimed the house to defendant and their son in

2003. Plaintiff did not want any interest in the house; however, until the time of trial, plaintiff had continued paying taxes on it and had contributed to repairs. Given the conduct of the parties, the trial court did not err in treating the property as marital property.

As to a survivor interest in plaintiff's pension, we note that a trial court can continue, modify, or even implement periodic spousal support for the first time after the payor spouse's death. *Estate of Luckow v Luckow*, 291 Mich App 417, 424; 805 NW2d 453 (2011). Since the award of spousal support was periodic and modifiable in this case, defendant was not without some measure of security in the event of plaintiff's death. Under these circumstances defendant cannot show she is entitled to relief.

Lastly, defendant argues that plaintiff had a greater ability to pay her attorney fees and that she should not be required to invade her property award to pay her attorney fees. This Court reviews the findings of fact on which the trial court bases its decision whether to award attorney fees for clear error. *Reed*, 265 Mich App at 164. But this Court reviews the trial court's ultimate decision for an abuse of discretion. *Id.* The trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Ewald v Ewald*, 292 Mich App 706, 724-725; 810 NW2d 396 (2011).

The party seeking attorney fees has the burden to establish both financial need and the ability of the other party to pay. *Id.* at 724. Defense counsel estimated that his fees were approximately \$7,000, but did not explain why defendant would be unable to bear the expense. Here, the trial court found that defendant had not established that plaintiff had a greater ability to pay after comparing the parties' incomes and expenses. When awarding attorney fees, the trial court should consider "the extent to which its award of spousal support leaves the parties with assets and income comparable to one another." *Gates v Gates*, 256 Mich App 420, 439; 664 NW2d 231 (2003). The trial court compared plaintiff's and defendant's income and expenses and found that, after awarding spousal support, both parties' incomes would be substantially equal; it found that plaintiff would have about \$900 a month in disposable income and defendant would have about \$800 a month in disposable income. We cannot conclude that the trial court clearly erred in these findings. Consequently, the trial court did not abuse its discretion when it refused to order plaintiff to pay defendant's attorney fees.

There were no errors warranting relief.

Affirmed. As the prevailing party, plaintiff may tax his costs. MCR 7.219(A).

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly
/s/ Mark T. Boonstra