STATE OF MICHIGAN

COURT OF APPEALS

KIERSTEN HEATHER THELEN, Plaintiff-Appellee,	UNPUBLISHED September 11, 2012
v	No. 305010 Clinton Circuit Court
TIMOTHY ALAN THELEN, Defendant-Appellant.	LC No. 09-021791-DO

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

In this divorce action, defendant challenges the trial court's disposition of property and award of attorney fees. We conclude that the trial court properly held that the parties' antenuptial agreement did not control the disposition of property and that the court did not abuse its discretion in awarding partial attorney fees to plaintiff.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On October 19, 2000, two days before they married, the parties signed an antenuptial agreement expressing their intent to retain control of their separate earnings, to maintain separate bank accounts, and to separately maintain the assets listed in the agreement. The list of the parties' separate property included defendant's premarital house, the parties' cars, and the parties' retirement accounts. The agreement provided that any property "acquired by the parties either before or during their marriage and expressly held as joint property" was not subject to the agreement.

After the parties married, they resided in defendant's home on Burlington Drive. The parties jointly refinanced the mortgage on the Burlington Drive home in 2001. The parties signed a second agreement on the same day expressly incorporating the terms of the antenuptial agreement. The second agreement provided that the equity from the Burlington Drive home would remain defendant's separate property and provided that the home would become a joint asset of the parties. After the parties refinanced the Burlington Drive home, they withdrew equity from the home to fund defendant's education. However, defendant did not use the money for an advanced degree and instead deposited the money into a joint retirement account.

The parties sold the Burlington Drive home and deposited the proceeds from the sale into a joint account. The parties also deposited other funds into that account and eventually used the

money from that account as a down payment on a home that the parties built together on Angie Way. Both parties were named on the mortgage and on the deed to the Angie Way home.

Plaintiff testified that the parties had never maintained separate bank accounts. She testified that the parties had a joint bank account at Flagstar Bank into which they directly deposited their paychecks and from which they paid their bills, mortgage payments, car payments, and defendant's credit card payments. Defendant testified that he contributed to his retirement accounts from the joint account and claimed that the account was "a clearing house" that he used before moving his personal money elsewhere.

Defendant withdrew $60,000 from the parties' home equity to purchase franchise licenses. Plaintiff testified that she was jointly liable for the franchises, but was not an owner. She testified that the parties had received a refund of $10,000 on one of the licenses, and that the refund had been deposited into a Fifth Third Bank account. She also testified that defendant had set up an account at Fifth Third for the LLC to use for business transactions related to the franchises. Plaintiff testified that, at or near the time she filed for divorce, defendant moved that money into a separate Fifth Third account. Defendant admitted that he withdrew nearly the entire balance from the parties' joint account, including both parties' paychecks, and placed the money into a Fifth Third account. Defendant also admitted that he had removed furniture and appliances from the home without permission after the trial court had entered a restraining order prohibiting the removal of any property.

Defendant admitted that he had not disclosed some of his bank accounts in his answers to interrogatories. Defendant testified at trial that his employer had given him a car allowance. However, defendant admitted he had not disclosed a car allowance on his answers to interrogatories and, when impeached with his offer of employment, defendant admitted that the offer had not indicated that he received a car allowance.

The trial court ruled that it was inequitable, unfair, and unreasonable to attempt to enforce the antenuptial agreement and that the agreement did not control the disposition of the parties' property. The trial court used the antenuptial agreement to determine what separate property the parties had brought into the marriage, awarded the parties those properties, and divided the increase in value of these assets during the marriage between the parties.

The trial court also found that defendant's tactics had made it difficult for plaintiff to obtain information and there had been "no reason for this kind of time and this kind of trial." It found that "much of this was unnecessary, much of this was frivolous, much of this was a waste of the clients' money . . . and it didn't need to be." The trial court then awarded $10,000 in attorney fees to plaintiff.

II. THE ANTENUPTIAL AGREEMENT

Defendant argues that the trial court erred when it determined that the parties' antenuptial agreement did not control the disposition of their assets. We disagree.

This Court reviews the trial court's findings of fact for clear error. See *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). "A trial court's refusal to enforce a prenuptial agreement is reviewed for an abuse of discretion." *Woodington*, 288 Mich App at

372. The trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"[A]ntenuptial agreements governing the division of property in the event of divorce are enforceable in Michigan." *Rinvelt v Rinvelt*, 190 Mich App 372, 382; 475 NW2d 478 (1991). However, an antenuptial agreement "may be voided (1) when obtained through fraud, duress, mistake, or misrepresentation or nondisclosure of material fact, (2) if it was unconscionable when executed, or (3) when the facts and circumstances are so changed since the agreement was executed that its enforcement would be unfair and unreasonable." *Reed v Reed*, 265 Mich App 131, 142-143; 693 NW2d 825 (2005). To determine changed circumstances, "the first step . . . is to focus on whether the changed circumstances were foreseeable when the agreement was made." *Id*. at 144.

The trial court did not abuse its discretion when it determined that circumstances had changed from the time when the parties made the agreement such that enforcement of the antenuptial agreement would be unfair and unreasonable. The parties' expressed intent in the agreement was to keep their separate assets separate and to maintain separate bank accounts. It was clearly not foreseeable at the time the parties entered into the antenuptial agreement that they would comingle their assets to the extent that they did. The parties refinanced defendant's separate house into both of their names, even though defendant testified that he "didn't need somebody else to be on the loan at all." The parties then sold the home, placed the assets into a joint account, and jointly purchased a new home. The parties never had separate bank accounts. Defendant "folded" his separate account when the parties married. The parties' directly deposited their checks into their joint bank account, and used that account to pay all of their monthly expenses. The parties purchased cars from the joint account. The parties contributed to their retirement accounts from the joint account. The evidence supports the trial court's finding that the parties had not maintained their separate assets separately and that the facts and circumstances surrounding the parties' property had changed in a significant way from when the parties had entered into the antenuptial agreement. The trial court did not abuse its discretion in concluding that it would be unfair and unreasonable to attempt to enforce the antenuptial agreement.

III. ATTORNEY FEES

Defendant argues that the trial court abused its discretion when it awarded plaintiff $10,000 in attorney fees and that the amount of fees awarded was not reasonable. We disagree.

We review a trial court's award of attorney fees as a sanction for an abuse of discretion. See *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). We review the trial court's finding that an action was frivolous for clear error. See *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). A trial court's finding that an action is frivolous is clearly erroneous when, although there is evidence to support it, the reviewing court has the definite and firm conviction that a mistake was made. *Id*.

The trial court clearly stated that it was awarding attorney fees under MCR 2.114 and MCR 2.625(A)(2). MCR 2.114 allows a court to award sanctions under MCR 2.625(A)(2)

against a party pleading a frivolous claim or defense. MCR 2.625(A)(2) directs the trial court to award costs as provided by MCL 600.2591, if the court finds that "an action or defense was frivolous." MCR 2.625(A)(2). The statutory section allows the court to "award to the prevailing party the costs and fees incurred by that party in connection with the civil action." MCL 600.2591(1). This section provides that "frivolous" means that either (1) the party's primary purpose in asserting an action or defense was to harass, embarrass, or injure the prevailing party, (2) the party had no reasonable basis to believe the facts underlying its legal position were true, or (3) the party's legal position was devoid of legal merit. MCL 600.2591(3).

The trial court made sufficient factual findings to support that the primary purpose of some of defendant's actions had been to harass, embarrass, or injure plaintiff. It found that personal animosity had been a "real problem[] in this case." It also found that "it was obviously difficult for the wife, in particular, to get the information that was necessary—through no fault of hers—and because of the husband's tactics." The court stated that defendant had not been fair to the mediator, plaintiff, or himself when he did not attend the second day of mediation. It found that the trial should have taken one day not five days, and that "much of this was unnecessary, much of this was frivolous, much of this was a waste of the clients' money." Both parties' testimony supported these findings, and a review of the record does not leave us with a definite and firm conviction that the trial court made a mistake. Accordingly, the trial court did not abuse its discretion when it awarded plaintiff attorney fees.

We decline to consider defendant's argument about the reasonableness of plaintiff's attorney fee award. When a party raises the reasonableness of the attorney fee award for the first time on appeal, it is not preserved and we need not consider it. See *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2d 394 (1992). Defendant did not challenge the reasonableness of the award below and did not even cross-examine plaintiff regarding the amount of her attorney fees.[1]

III. TRIAL PROCEDURE

Defendant cites only one unpublished case in support of his unpreserved arguments that the trial court utilized procedures that denied him an equal and fair opportunity to present his case.[2] A party may not "merely announce their position and leave it to this Court to discover and rationalize the basis for their claims; nor may they give issues cursory treatment with little or no citation to supporting authority." *Vanderwerp v Charter Twp of Plainfield*, 278 Mich App 624, 633; 752 NW2d 479 (2008). Thus, we consider these issues abandoned. Nonetheless, the arguments are without merit. "The mode and order of interrogating witnesses is within the trial court's discretion," *Linsell v Applied Handling, Inc*, 266 Mich App 1, 22; 697 NW2d 913 (2005),

[1] Even were we to consider this issue, we would conclude it is without merit.

[2] Defendant cites *Niva v Najer*, unpublished per curiam decision of the Court of Appeals issued March 18, 2010 (Docket No. 287806). *Niva* is factually distinguishable from the present case. Further, "unpublished decisions are not precedentially binding." *Neville v Neville*, 295 Mich App 460, 470; 812 NW2d 816 (2012).

and that the trial court may question a witness to obtain more accurate and fuller testimony, to clarify points, and to draw out additional facts. *People v Smith*, 64 Mich App 263, 266-267; 235 NW2d 754 (1975). Additionally, defendant does not indicate any point in the lower court record where the trial court acted improperly in questioning him. A party must explain the factual basis that sustains its position with specific references to the record. MCR 7.121(C)(7); *Begin v Mich Bell Tel Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009). Similarly, defendant's arguments that the trial court indicated that the case was going too long and needed to be finished on the fifth day of trial and that the trial court disregarded his evidence are without a factual basis in the record.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot