STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY A. LAGUEUX, Plaintiff-Appellant,	UNPUBLISHED May 10, 2012
v	No. 305456 Genesee Circuit Court Family Division
MICHAEL J. LAGUEUX, Defendant-Appellee.	LC No. 10-294621-DM

Before: K. F. KELLY, P.J., and WILDER and BOONSTRA, JJ.

PER CURIAM.

In this domestic relations matter, plaintiff appeals as of right from a judgment of divorce arguing: (1) the trial court erred in granting joint physical custody of the couple's children with alternating weeks of parenting time; (2) the trial court erred in awarding nonmodifiable spousal support and holding that support in abeyance until defendant finds employment; (3) the trial court erred in requiring that a promissory note upon which defendant owes money must be satisfied from a marital asset; and (4) if remand is warranted, the case should be heard by a different judge. We find no basis to disturb the divorce judgment and, therefore, affirm.

I. BASIC FACTS

Plaintiff and defendant married in 2003 and have two young minor children, a son and a daughter. Plaintiff filed for divorce on April 13, 2010, requesting custody of the children subject to supervised parenting time with defendant. Plaintiff also moved for an "interim safety order" on May 27, 2010, asserting that defendant struggles with substance abuse and mental health issues and sometimes acts erratically. She requested that she and the children be allowed to move out of the marital home, or that defendant move out, and that defendant's parenting time be supervised with no overnights and no use of drugs or alcohol. The trial court entered the interim order, and plaintiff moved with the children to the family's cottage in Lexington.[1]

[1] Plaintiff and her brother inherited the cottage from their father and were joint owners.

The trial court held a bench trial, and, on June 7, 2011, the court entered an order dissolving the marriage and addressing custody, parenting time, child support, and property division. The order stated that the remainder of the balance defendant owed on a promissory note to his employer, Barton Malow, was to be paid out of the marital portion of defendant's annuity. The trial court also found an established custodial environment with both parents and, after analyzing the best interest factors, ordered that plaintiff be granted sole legal custody, because of the parties' inability to cooperate, but granted the parties joint physical custody with alternating weeks of parenting time. The judgment of divorce was entered on July 18, 2011. In addition to reiterating the terms of the June 7, 2011, order, the divorce judgment ordered that defendant pay plaintiff "modifiable spousal support" of $695 a month for 36 months, to begin when defendant returned to work.

II. CHILD CUSTODY

Plaintiff first argues that the trial court's finding that an established custodial environment existed with both parents and its findings under the best-interest factors were against the great weight of the evidence. We disagree.

This Court must affirm all custody orders of the circuit court "unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). This Court shall not substitute its judgment on questions of fact unless the evidence "clearly preponderates in the opposite direction." *Pierron*, 486 Mich at 85 (quotations omitted). The trial court's ultimate decision is reviewed for an abuse of discretion. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003). "An abuse of discretion occurs when a court selects an outcome that is outside the range of reasonable and principled outcomes." *Ewald v Ewald*, 292 Mich App 706, 715; ___ NW2d ___ (2011).

A. ESTABLISHED CUSTODIAL ENVIRONMENT

"The court shall not . . . issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c). Accordingly, before analyzing the child's best interests and entering a custody order, the court must first determine if there is an established custodial environment. MCL 722.27(1)(c); *Mogle v Scrivner*, 241 Mich App 192, 197; 614 NW2d 696 (2000).

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

"The existence of a temporary custody order does not preclude a finding that an established custodial environment exists with the noncustodian." *Berger v Berger*, 277 Mich App 700, 706-707; 747 NW2d 336 (2008). A custodial environment may exist even in violation of a custody order. *Id.* at 707. "An established custodial environment may exist with both parents where a

child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort." *Id.* at 707.

The trial court found that an established custodial environment existed with both parents. The court found that, although defendant struggles with substance abuse, he has not been intoxicated since December of 2008. The court noted that the children's custodial environment with defendant was disrupted by the interim order placing the children with plaintiff and allowing defendant only supervised parenting time, but found the disruption unnecessary and remarked that defendant has "made the best of his parenting time and remained a significant and positive constant in his children's lives." The court found plaintiff not credible and stated that "her shortcomings rest on her concerted effort to see the [d]efendant separated from a meaningful relationship with his kids" and that she has "consistently demonstrated a lack of insight to just how vitally important Dad is" to the kids.

There is more than sufficient evidence in the record indicating that the children look to defendant, in addition to plaintiff, for guidance, discipline, the necessities of life, and comfort. Defendant sometimes drops the children off at school and attends school conferences to discuss their educational needs. He bicycles with the kids, takes them for rides in the golf cart, and takes them swimming and to soccer games. Defendant often took care of the children alone and has also taken them camping by himself. Even plaintiff's witnesses testified defendant is a good parent and the children act lovingly toward him. Plaintiff testified defendant changed diapers when the children were infants, bathes the kids, and plays with them. Defendant testified he has always been an involved father. He got up with the children in the night when they were small, takes them to doctor's appointments, and bakes and cooks for them. He now has a four-bedroom house and both children have their own rooms and like the house. He also talks to the children on the phone frequently when they are with plaintiff. Further, all of the testimony indicating that the children look to plaintiff for their needs indicates only that the children look to her for their needs *when they are in her care*, not that they look *exclusively* to her to meet those needs. In light of these facts, the trial court's finding that an established custodial environment existed with both parents was not against the great weight of the evidence.

Plaintiff argues that the trial court's conclusion that defendant has not been intoxicated since December 2008 is erroneous. Plaintiff is correct; defendant admitted he was last intoxicated in early 2009, not December 2008. However, it is unclear how this difference, which is at most a few months, affects whether the children look to defendant for their needs and, regardless, is not of such magnitude that it impacts the court's finding that a custodial environment exists with both parents. Plaintiff also avers that the established custodial environment is with her because the children have been solely in her custody since the interim order, to which defendant stipulated, was issued in June 2010. As noted, a trial court's finding of an established custodial environment need not depend upon, or comply with, an interim order and, thus, plaintiff's argument is without merit. *Berger*, 277 Mich App at 706-707. Plaintiff's argument that the court did not mention the children's living arrangement with plaintiff under the interim safety order is also unavailing; the court clearly discusses the interim order's terms as they relate to the custodial arrangement in its June 7, 2011, order. Additionally, defendant testified he did not knowingly stipulate to the supervision of his parenting time with the children and, furthermore, all parties thought that the interim order would last only a few weeks at the

time it was entered into. There is no indication defendant intended to relinquish custody of the children to the extent that the sole established custodial environment would be with plaintiff.

B. BEST-INTEREST FACTORS

When a trial court is resolving a custody dispute, the best-interest factors of MCL 722.23 control the analysis.

1. Factor (b) – The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

The trial court found the following under factor (b): "The parties love their children and show it frequently. These parents both appear to guide the children in a direction that allows them to grow and learn. This factor is equal."

The record does not support plaintiff's assertion that defendant's alcohol issues affect his ability to give his children love, affection and guidance. He has never been diagnosed as alcoholic or suicidal, as plaintiff insinuates. Defendant saw Linda Toy, a substance-abuse counselor, for 10 sessions, and she did not ultimately feel he had a substance-abuse problem. Defendant's physician, Dr. Jyothi Nutakki, also stated specifically in her notes that defendant has never expressed suicidal tendencies and only noted a concern about it in defendant's records based on remarks made to her by plaintiff. There is little evidence defendant's drinking or marijuana use has ever directly affected the children, other than plaintiff's assertion that defendant was intoxicated while driving the golf cart when their son fell out and hit his head. Defendant denies being drunk during this incident and claims the child stood up as the golf cart hit a pothole and lurched, causing him to fall out. The trial court generally found defendant more credible, and this Court will not disturb the court's findings of fact unless the evidence preponderates clearly in the opposite direction. *Pierron*, 486 Mich at 85. Defendant has also been actively involved in therapy and has not been intoxicated for over two years.

Additionally, there is no evidence that the children need any extra parental care at this stage in their lives due to special needs. Although their son suffers from enuresis, this is not uncommon for children his age. He was originally enrolled in the Early Childhood Development Delay program, for students with learning difficulties, but has progressed to the point where he no longer needs classroom assistance and receives good report cards. Their daughter received an educational diagnosis of Autism Spectrum Disorder, but is not severely impaired and does not need to be in a special program. There is no evidence the children require special care at home; all testimony related to their special needs concerned their education. Both parents have been involved in the children's educational planning. The trial court's findings under this factor are not against the great weight of the evidence.

2. Factor (c) – The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

The trial court found the following under factor (c):

> There has been no dispute that Defendant was the breadwinner in this relationship and that Plaintiff was a homemaker. It is clear from reading the psychological records presented by both parties that each has the disposition to provide these basic necessities to the children. However, only Defendant has the financial ability to do so. This factor slightly favors Defendant.

As noted, the trial court did not find credible plaintiff's concerns that defendant's tendency to abuse alcohol would negatively affect his parenting. The record also shows plaintiff worked as a massage therapist until their son's birth in 2004, but that she has not otherwise worked outside the home during the marriage except for two months in early 2010. She earned only $2,900 in 2010 and had to leave the job because she could not find child care. She has not gotten a job since the divorce. Defendant, by contrast, earned an average of $90,000 during the years 2006 through 2009. At the time of trial he was drawing unemployment, but testified that, as a project manager in the commercial construction business, there are occasional down times between projects and he anticipated starting another project soon. Economic considerations should not receive excessive weight in deciding custody issues. *Dempsey v Dempsey*, 409 Mich 495, 498; 296 NW2d 813 (1980). However, the trial court noted that this factor only *slightly* favored defendant and, given the record, this finding is not against the great weight of the evidence.

3. Factor (d) – The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

The trial court found the following under factor (d):

> Testimony indicated that there was instability of the marital home that predates Defendant's departure. This situation is all too common in instances where the parties continue to live together during divorce proceedings. As such, the court does not believe that the blame can rest solely on either party. Both Plaintiff and Defendant made a concerted effort to ensure that this divorce would be a most contentious and ill-willed process. As such, this factor is equal and the court does not use it to benefit either party.

The trial court's finding that both parties contributed to instability in the marital home is supported by the record. Plaintiff became dissatisfied with defendant's behavior in 2009, around the time the family began to have financial trouble. She did not trust defendant to watch the children alone, so she asked family members to come to the house when she was gone, even when defendant was home. Defendant thought this was unnecessary and, on one occasion, kicked his sister out of the house because he did not think she needed to be there. The parties fought to the point of needing to call the police in June 2010. The parties also experienced financial difficulty and lost two homes to foreclosure. The trial court's findings under this factor are not against the great weight of the evidence.

4. Factor (e) – The permanence, as a family unit, of the existing or proposed custodial home or homes.

The trial court found the following under factor (e):

> The marital home and cottage have been lost to foreclosures. At this point there is no permanent custodial home and the parties are transient. Plaintiff lives in an apartment in the Grand Blanc area and it is uncertain whether she will choose to remain there after her lease ends. Likewise, Defendant is living in a four[-]bedroom house owned by his parents where there is no guarantee that he will remain. However, "[T]he focus of factor e is the child's prospects for a stable family environment." In either case, due to the uncertainty of both parties['] living arrangements, this factor is equal. [Citation omitted.]

The trial court's finding that the marital home and family cottage have been lost to foreclosures is supported by the record. The evidence also suggests neither of the parties' present environments is particularly stable. Although defendant's home is owned by his parents, defendant cannot currently afford the house on his own. Plaintiff's apartment costs $715 a month, but plaintiff has no income. Both parties' arguments turn on placing blame with the opposing party for the loss of the marital home. However, the focus under this factor is on "the child's prospects for a stable family environment." *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996). The trial court's finding that this factor does not favor either party is not against the great weight of the evidence.

5. Factor (f) – The moral fitness of the parties involved.

Under factor (f) the trial court found:

> This particular factor has been a source of mutual mud-slinging. There has been ample testimony regarding Defendant's alcoholism, marijuana use and theft of movies and music from the internet. On the other hand there has also been adequate evidence of Plaintiff's drinking habits. The claim of hard partying by both parties is just one of the junctions where the case jumped the tracks, lawyer assisted.
>
> In either instance, no one has claimed that these parties are candidates for the parent-of-the-year award. Plaintiff testified that her drinking was done outside the presences of the children; Defendant testified that he quit drinking in 2009 and that his drug use ceased at about the same time. Neither party is perfect, nor does the court expect them to be. As such, this factor is equal.

As noted, the record shows both parties have engaged in alcohol abuse. Defendant has also smoked marijuana regularly, illegally downloaded media content from the internet, and submitted false time cards to his employer in order to continue drawing paychecks while he was not working. However, he admitted his falsification of records was wrong, signed a promissory note to repay Barton Malow, and is still employed there. He is in therapy and has not been intoxicated since early 2009. There is also evidence that both parties stole each other's documents, recorded their actions, and spied on each other by checking the other party's cell phones. In light of the bad behavior of both parties, and considering defendant's efforts to repair his mistakes, the court's finding that the parties are equal under this factor is not against the great weight of the evidence.

6. Factor (g) – The mental and physical health of the parties involved.

The trial court found the following under factor (g):

> Again, and somewhat overlapping factor (F), this has been the subject of a great deal of testimony against Defendant. The court has reviewed a stack of approximately five hundred pages of psychological evaluations presented by Plaintiff and admitted as a whole by Defendant under MRE 106. The records span from 2008 to 2010 and show a man trying to work out his feelings regarding a failing marriage and pending divorce, as well as his concerns about his ability [to] continue to support himself and his family. These are normal reactions to an emotionally difficult time.
>
> An issue that surfaced during the litigation was the alleged suicidal tendency of Defendant. The only report of this was by Plaintiff to Defendant's therapist. Defendant has never self-reported any suicidal ideations. While Defendant has been prescribed several common anti-depressants over the last few years, his psychological records do not show any serious mental health concerns. Defendant's depression and Attention Deficit Disorder do not affect his ability to parent.
>
> Testimony was also taken from Plaintiff's therapist of three years, Carol Osborn. Plaintiff has also been diagnosed as depressed and also is taking medication. Additionally, Ms. Osborn met with Defendant professionally on three occasions. Again, this testimony was not persuasive to the court.
>
> Based on the psychological records and testimony regarding Plaintiff's and Defendant's mental health, the court finds this factor to be equal.

As noted under factor (b), the record does not support plaintiff's assertions that defendant is alcoholic or suicidal. Nor do his mental health practitioners have any concerns about defendant's ability to parent his children. The only expert testimony indicating that defendant may have mental health issues that affect his parenting was from Carolyn Osborn, who is plaintiff's therapist and saw defendant alone only three times. Osborn admitted that her concerns about whether defendant should have access to the children were based on what plaintiff told her. Plaintiff has also been in therapy for more than three years for depression. The trial court's finding that the parties are equal under this factor is not against the great weight of the evidence.

7. Factor (h) – The home, school, and community record of the child.

Under factor (h) the court found:

> [Their son] is in Kindergarten. Although he has areas of concern, [his] 2011 report card indicates he is "progressing as expected." [Their daughter] is not yet in school but has been diagnosed on the Autism spectrum. She will probably need some special assistance with school regardless of which parent she is with. This factor is equal.

Although plaintiff, as a stay-at-home parent, has been more involved in the children's education, defendant has also participated in school conferences and educational planning. Plaintiff cites no authority, and we find none, for her assertion that the trial court's grant of legal custody to her means she should be automatically favored under this factor. As noted under factor (b), the record shows their son struggled with enuresis and speech delays but has progressed to the point where he no longer needs special assistance in the classroom, and their daughter's educational diagnosis of Autism Spectrum Disorder is not severe. The record supports defendant's contention that their son's recent episodes of enuresis were more likely due to marital tension than defendant's presence, since they also occurred when their son was in plaintiff's sole care. Because there is no indication the children's home, school, or community records have suffered particularly under either parent, the trial court's findings with respect to this factor are not against the great weight of the evidence.

8. Factor (j) – The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

The trial court found the following with respect to factor (j):

> A review of the record shows a consistent effort by Plaintiff to minimize or eliminate the parenting time of Defendant. Defendant currently has supervised parenting time based on a temporary order issued by the referee.
>
> In contrast, Defendant has filed motions to increase his parenting time and seems to have a genuine interest in seeing his children without alienating [ ] Plaintiff. This factor favors Defendant.

The record shows that, throughout the proceedings, plaintiff has consistently sought to reduce defendant's parenting time and to restrict it to supervised time only. The trial court found that the interim order minimizing, and requiring supervision of, defendant's parenting time was unwarranted. Defendant, by contrast, has sought joint physical custody of the children with plaintiff. The trial court's finding that this factor favored defendant was not against the great weight of the evidence.

9. Factor (k) – Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

Under factor (k) the court found:

> Testimony was presented regarding an altercation between the parties that resulted in the police being called to the scene. Defendant admitted to an argument and to throwing water on Plaintiff. Plaintiff testified that Defendant also twisted her arm, a claim that Defendant denied. The responding officer was called as a witness, however his testimony proved inconclusive as to whether Plaintiff's injuries were the result of the altercation or self-inflicted.
>
> Because the court is not satisfied these marks were the result of domestic violence, this factor is not applicable.

Officer Charles Hainer, who responded to a report of domestic violence at the couple's home in June 2010, testified that plaintiff had red marks on her arm that appeared to be from someone grabbing it and twisting. Officer Timothy Ray Speckman, the other responding officer, watched a recording defendant took of part of the incident, which showed plaintiff rubbing her arm, but he thought it looked like she was rubbing an injury she had received rather than trying to injure herself. Plaintiff testified the injury was caused by defendant grabbing her arm. Defendant denied grabbing plaintiff's arm but admitted throwing water on her.

The testimony regarding the sole alleged incident of domestic violence is conflicting. It is the responsibility of the factfinder to determine the credibility and weight of trial testimony. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 202; 755 NW2d 686 (2008). "[A]n appellate court should not conduct an independent review of credibility determinations, disregard findings of fact, or create new findings of fact." *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113; 793 NW2d 533 (2010). The trial court was free to believe defendant and disregard the testimony of plaintiff and her witnesses. The testifying officers did not observe the incident. The evidence does not clearly preponderate against a finding that the marks on plaintiff's arm were not a result of domestic violence. There was no testimony regarding any other incidents of domestic violence. The trial court's findings under this factor were not against the great weight of the evidence.

10. Ultimate Custody Decision under the Best-Interest Factors

The trial court found that factors (a), (b), (d), (e), (f), (g), and (h) were equal, that factors (c) and (j) favored defendant, and that factors (i), (k), and (l) did not apply. The court's findings were not against the great weight of the evidence. Given the findings under the factors, the trial court's ultimate decision to grant joint physical custody was not an abuse of discretion.

III. SPOUSAL SUPPORT

Plaintiff next argues that the trial court awarded nonmodifiable spousal support in violation of law, and that the trial court's order allowing defendant to wait until he is employed to pay spousal support was inequitable. We disagree.

An award of spousal support is within the trial court's discretion. *Berger*, 277 Mich App at 726. The trial court's factual findings in a divorce case are reviewed for clear error. *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005). This Court will not reverse factual findings unless it is definitely and firmly convinced a mistake has been made. *Id.* "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 v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). This Court must affirm the trial court's ruling regarding spousal support unless "firmly convinced that it was inequitable." *Berger*, 277 Mich App at 727.

The award of spousal support depends on many factors, including:

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties'

> health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Id.* at 726-727, quoting *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).]

"The goal behind dividing marital property is to reach an equitable distribution in light of all the circumstances." *Id.* at 716-717. The property and liabilities of the parties need not be equally divided; they need only be equitably divided. *Id.* at 717.

A. MODIFIABILITY OF SPOUSAL SUPPORT AWARD

MCL 552.28 provides, in relevant part, that "[o]n petition of either party, after a judgment for alimony or other allowance for either party or a child, . . . the court may revise and alter the judgment." This statute requires that all spousal support awards be modifiable unless the parties have structured an agreement constituting an award of alimony in gross, meaning that the amount owed is a definite sum to be paid in installments and is not subject to any contingency. *Staple v Staple*, 241 Mich App 562, 565-566; 616 NW2d 219 (2000). "[A]limony in gross is not really alimony intended for the maintenance of a spouse, but rather is in the nature of a division of property," and is therefore exempt from MCL 552.28. *Id.* at 566. This Court has stated that, unless the parties have entered an agreement structuring alimony in gross, MCL 552.28 will apply, even if the trial court's spousal support award expressly limits alimony to a certain number of years. *Gates v Gates*, 256 Mich App 420, 433-434; 664 NW2d 231 (2003). Accordingly, any judgment limiting alimony to a number of years will be construed as modifiable unless it is entered pursuant to the parties' agreement to structure alimony as in gross.

The trial court awarded plaintiff spousal support in the amount of $695 a month for 36 months. The order expressly stated that the award was modifiable. There is no indication that the parties contemplated any sort of alimony-in-gross arrangement. Accordingly, the support award will be construed as modifiable under the law, despite its provision for 36 months of payment, and plaintiff's argument that the award is nonmodifiable is without merit. Although the trial court determined that spousal support extending for more than three years was not warranted at this time, either party may petition to modify the award under MCL 552.28 if new facts arise or there is a change in circumstances. *Gates*, 256 Mich App at 434-435.

B. ABEYANCE OF SPOUSAL SUPPORT UNTIL DEFENDANT IS EMPLOYED

The trial court discussed defendant's unemployment under factors six (ability to pay) and seven (present situation of the parties), and determined that defendant's spousal support obligation would begin only upon his return to work. The record supports the court's factual findings. Defendant was not working at the time of trial and was drawing $362 a week in unemployment. Additionally, defendant's parents own the house in which he resides and help him pay his utility bills and car payments. He took out a loan against his Corvette for more than the car is worth, and owes over $20,000 in legal fees. Defendant owes about $15,000 on his Pacifica. He also pays $183 a month in child support and owes $15,700 on his promissory note to Barton Malow. He has no savings and no major assets. In light of the circumstances, the trial

court's ruling that defendant need not pay spousal support until he returns to work was fair and equitable.

IV. PROMISSORY NOTE

Plaintiff also argues that the trial court erred by requiring that the remaining balance defendant owes on his promissory note to Barton Malow be paid out of the marital portion of defendant's annuity. We disagree.

The standard of review is the same for division of marital property and liabilities as it is for awards of spousal support. *Berger*, 277 Mich App at 727. This Court reviews findings of fact for clear error and, if those findings are upheld, this Court will not overturn the trial court's holding unless firmly convinced that the division of property was inequitable. *Id.* at 717-718.

The trial court stated that it felt "compelled to treat [the promissory note] as a marital debt as a matter of equity. The parties each benefitted from the use of this money; as such the parties should share in the repayment."

The record shows that the money defendant wrongfully collected from Barton Malow, the return of which is the subject of the promissory note, went into the marital bank account. Plaintiff's portion of the debt under the order would be 29 percent, which is close to the proportion of the other marital debts for which the trial court held her liable: 25 percent. Plaintiff does not contest her 25 percent liability for the other debts. She merely maintains that she should not be liable at all for the promissory note because it was accrued by defendant wrongfully and without her knowledge. Although plaintiff's situation is unenviable, her innocence does not counteract the fact that this money came into the possession of both parties during the marriage and was used for marital obligations. Had defendant never obtained the funds, the marital assets would be reduced proportionately. The trial court's ruling that the remainder of this debt should be paid out of the marital portion of the carpenter's annuity was equitable.

Plaintiff finally argues on appeal that, if this case is remanded, it should be heard before a different trial court judge. Because remand is not warranted, we need not address this issue.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Mark T. Boonstra