

STATE OF MICHIGAN
COURT OF APPEALS

MICHELLE D. PETRELLA,

Plaintiff-Appellee/Cross-Appellant,

v

RICHARD E. PETRELLA,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED

April 25, 2000

No. 214222

Oakland Circuit Court

LC No. 96-523842 DM

Before: Kelly, P.J., and Doctoroff and Collins, JJ.

PER CURIAM.

Defendant appeals as of right from an order of the Oakland Circuit Court entering a judgment of divorce. Plaintiff has filed a cross-appeal. We affirm.

The parties married in April, 1994. They had one child during the marriage. Plaintiff filed for divorce in May, 1996. Both parties remained in the marital home until April, 1998, when plaintiff moved out of the home. This case involves two marital assets, the marital home and a business started by defendant during the marriage, Metro Graphic Centre, Inc. (Metro Graphic). The trial court divided the marital property approximately equally between the parties, awarding the marital home to plaintiff and Metro Graphic to defendant.

Defendant first argues that the trial court made erroneous findings of fact that resulted in an inequitable property division. We disagree. When reviewing a property distribution, this 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, after reviewing the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If the trial court's findings of fact are upheld, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts. *Sparks, supra* at 152. The dispositional ruling is discretionary and should be affirmed unless this Court "is left with the firm conviction that the division was inequitable." *Id.*

First, defendant argues that the trial court clearly erred in finding that plaintiff contributed to the maintenance and expenses of the marital home until April 1998, when she moved out of the home.

However, the record contains substantial support for the trial court's finding. Plaintiff was employed throughout the marriage, with the exception of the three months following the birth of the parties' child. Plaintiff testified that, for the majority of the marriage, both plaintiff and defendant deposited their paychecks into a joint account, and that the household and renovation bills were paid from that account. Plaintiff further testified that she contributed to the maintenance of the house by mowing the lawn and doing other work inside and outside the house. In addition, the record indicated that plaintiff's father and grandfather contributed considerable time and effort to the renovation of the house. While defendant presented somewhat contradictory testimony, credibility issues are left to the trier of fact to resolve. MCR 2.613(C); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 174; 530 NW2d 772 (1995). After reviewing the testimony regarding plaintiff's contributions to the maintenance and expenses of the marital home, we are not convinced that the trial court clearly erred in finding that "both parties contributed to the maintenance, renovation, and financial payment obligation during the marriage."

Defendant next argues that the trial court clearly erred in finding that plaintiff contributed to the establishment and development of Metro Graphic. However, after reviewing the record, we find no clear error. Plaintiff testified that she attempted to get accounts for defendant's business and that she helped defendant to get an account with the Townsend Hotel, where she worked, but that defendant subsequently lost the account. Although defendant testified that plaintiff's influence caused him to lose the account, plaintiff's boss testified that defendant lost the account because of unsatisfactory work. Furthermore, plaintiff testified that, when defendant started Metro Graphic, he "did it all day and all night," so that the responsibilities of maintaining the home and caring for the parties' daughter fell onto plaintiff. See *Hanaway v Hanaway*, 208 Mich App 278, 293-294; 527 NW2d 792 (1995) (finding that increased value of husband's business interest was the result of time and effort he spent working at the business, which was facilitated by the wife's long-term commitment to remain at home to run the household and care for the children).

Defendant further contends that the trial court failed to consider the short duration of the marriage when considering plaintiff's contribution to Metro Graphic. Defendant claims that the trial court failed to consider that he had been working in the graphics field for approximately fifteen years, and that Metro Graphic was, in large part, a continuation of his former business. While it is true that defendant was involved in a graphics business before he started Metro Graphic, he was credited with the \$12,000 he received from selling his interest in the prior business and used to start Metro Graphic. Furthermore, considering the contributions plaintiff made at home that facilitated defendant's work at developing Metro Graphic, *Hanaway, supra*, we cannot conclude that the trial court's findings regarding plaintiff's contribution to the business were clearly erroneous.

Defendant next argues that the trial court erred in failing to value the marital home and Metro Graphic at the time plaintiff filed for divorce in May, 1996. We disagree. Generally, for the purpose of dividing property, marital assets are valued at the time of trial or at the time judgment is entered. *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997). However, the court has discretion to use a different valuation date. *Id.*; *Thompson v Thompson*, 189 Mich App 197, 199; 472 NW2d 51 (1991).

Here, the trial court valued the marital home as of the time of trial, April, 1998. The record indicates that both parties continued to live in the marital home and share household expenses after the complaint for divorce was filed in May, 1996, until plaintiff moved out in April, 1998, the same month

that the trial commenced. Defendant has not made a persuasive argument for a deviation from the general rule that marital assets are to be valued at the time of trial. *Byington, supra*, and we find no error in the trial court's valuation of the marital home at the time of trial. Similarly, we find no error in the trial court's valuation of Metro Graphic as of December 31, 1996. Plaintiff's expert testified with respect to the value of the business as of December 31, 1996. Plaintiff's expert explained that he could not give an opinion with respect to the value of the business in 1997, or at the time of trial, because defendant failed to provide the documents required for a valuation of the business after 1996. Because plaintiff's expert could not provide an accurate valuation of the business at the time of trial due to defendant's failure to produce the requested documents, the trial court properly exercised its discretion to value the business as of December 31, 1996.

Defendant next argues that the trial court's finding that the value of Metro Graphic was \$112,000 was clearly erroneous. Defendant asserts that the business should have been valued at \$25,000 to \$30,000, and that, considering his \$12,000 investment in the business and plaintiff's minimal contribution to the business, plaintiff's interest in the business should have been, at the most, \$4,000 to \$6,000.

Because, as is discussed below, the testimony of defendant's expert with respect to the value of the business was stricken as a discovery sanction, the court's valuation of the business was based on the testimony of plaintiff's expert, Joseph Cunningham. Cunningham testified that the business was worth \$98,000 to \$126,000. The trial court found the value of the business to be \$112,000, a value in the middle of the range suggested by Cunningham. While defendant argues that the trial court should have chosen a value at the lower end of the range suggested by Cunningham because the business had only been in existence for a short time, the earnings multiple used by Cunningham took that fact into consideration. Furthermore, defendant cites no persuasive authority for his argument that the business should have been valued at its net asset value rather than its going-concern value. Contrary to defendant's argument, *Rethman v Rethman*, 156 Mich App 74, 79; 401; NW2d 314 (1986), vacated 429 Mich 868; 413 NW2d 679 (1987), clearly does not stand for the proposition that businesses should be valued at their net asset value rather than their going-concern value. Furthermore, it is clear that the trial court credited defendant with the \$12,000 investment he made in the business from his separate property. We find no clear error in the trial court's finding that the value of Metro Graphic was \$112,000.

Next, defendant argues that the trial court erred in denying his motion for a new trial on the ground that the trial court misapplied her own findings of fact to the division of the property by failing to consider the \$23,000 down payment he made on the marital home approximately one year before the marriage from his separate funds. We disagree. A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *Settington v Pontiac General Hospital*, 233 Mich App 594, 608; 568 NW2d 93 (1997).

Relying on the testimony of defendant's expert, the trial court found that the marital home was worth \$275,000. By subtracting the mortgage balance of \$174,000, the court determined that the equity in the house was \$101,000. The court then credited defendant with the \$23,000 down payment he made before the marriage by subtracting the \$23,000 from the \$101,000, and found that the marital interest in the house was \$78,000. Thus, it is clear that the trial court considered defendant's down payment when determining the marital interest in the house.

Defendant further argues that the property division was inequitable because plaintiff received more than half of the marital property. We disagree. A trial court's dispositional ruling is discretionary and will be affirmed unless this Court "is left with the firm conviction that the division was inequitable." *Sparks, supra* at 152.

When apportioning a marital estate, the goal is to reach an equitable division in light of all the circumstances. *Byington, supra* at 114. Spouses need not receive mathematically equal shares of the marital estate, but significant departures from congruence must be explained clearly by the court. *Id.* at 114-115. The division of property is not governed by any strict set of rules. *Sparks, supra* at 159. However, the following factors should be considered where relevant to the circumstances of a particular case: 1) the duration of the marriage, 2) the contributions of the parties to the marital estate, 3) the age of the parties, 4) the health of the parties, 5) the life status of the parties, 6) the necessities and circumstances of the parties, 7) the earning abilities of the parties, 8) the past relations and conduct of the parties, 9) general principles of equity. *Id.* at 159-160.

Here, the parties received approximately equal shares of the marital estate. As stated above, the trial court found that the marital interest in the house was \$78,000. After crediting defendant with the \$12,000 investment he made in Metro Graphic, the trial court found that the marital interest in Metro Graphic was \$100,000. The court then divided the \$178,000 in marital assets between the parties equally, with \$89,000 being awarded to each party. The court then ruled that "[i]n order to prevent loss of value which may result from the sale of the home in its present condition, and the impracticality of dividing Metro Graphic Centre, Inc.," it would award the house to plaintiff and the business to defendant. However, because such an award left plaintiff with only \$78,000 in marital assets, with defendant receiving the entire \$100,000 marital interest in Metro Graphic, the court then allocated the \$23,000 down payment that defendant made on the house from his separate property to plaintiff. Thus, plaintiff received \$101,000 in marital assets and defendant received \$100,000 in marital assets.

Defendant challenges the trial court's finding that the house would lose value if sold in its then-present condition because defendant's expert testified with respect to the value of the house in an "as is" condition. Defendant argues that, because the valuation of the house accepted by the trial court was based on the "as is" condition of the house, there was no justification for awarding to plaintiff the \$23,000 down payment defendant made on the house. However, although defendant's expert witness testified with respect to the value of the house in an "as is" condition, she also testified that the poor condition of the house would jeopardize its value upon sale, noting that "a buyer would be very leery of its condition as is," and that "the home itself might low ball, just not knowing all the ramifications they might be dealing with in order to bring this house up to livability." In light of the expert testimony that the house might "low ball" due to the extensive repairs required to make the house livable, the trial court did not clearly err in finding that the house may have lost value if sold in its then-present condition.

After reviewing the record, including the audio tape submitted by defendant, we are not convinced that the approximately equal division of the marital property was inequitable under the circumstances of this case.

Next, defendant argues that the trial court erred in excluding the evidence presented by his expert, Richard Cech, with respect to the value of Metro Graphic as a sanction for failure to comply with discovery. We disagree. This Court reviews discovery sanctions for an abuse of discretion. *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998).

The factors that should be considered to determine an appropriate discovery sanction include 1) whether the violation was willful or accidental, 2) the party's history of refusing to comply with discovery requests, 3) the prejudice to the other party, 4) whether there exists a history of the party's engaging in deliberate delay, 5) the degree of compliance by the party with other provisions of the court's order, 6) attempts by the party to cure the defect, and 7) whether a lesser sanction would better serve the interests of justice. *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).

The record evidenced numerous failures on the part of defendant to comply with discovery requests. The repeated failures to deliver the requested documents related to the valuation of the business and the fact that the documents were provided to defendant's own expert indicate that the failure to deliver the documents was willful rather than accidental. Defendant's failure to comply with discovery was prejudicial because it resulted in plaintiff's expert not being able to accurately value the business for 1997. Although defendant argues that plaintiff erred by initially requesting the documents pursuant to a subpoena issued under MCR 2.305, rather than by a request for the production of documents under MCR 2.310, plaintiff's procedural error in requesting the documents does not excuse defendant's failure to comply with the prior request for the documents or the court's subsequent orders to produce the documents. The trial court did not abuse its discretion in striking the testimony of defendant's expert witness regarding the valuation of Metro Graphic as a sanction for defendant's refusal to comply with discovery requests and orders for documents relating to the valuation of Metro Graphic.

Next, defendant argues that the trial court erred in denying his motion for a new trial on the basis that his counsel was not capable of preparing for trial or performing at trial due to the illness and death of her mother during the instant proceedings. We disagree. A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *Setterington, supra*.

After having reviewed the record, we conclude that defense counsel adequately represented her client and that defendant was not prejudiced by defense counsel's representation. Our review of the record leaves us with the impression that the failure to turn over the documents relating to the valuation of Metro Graphic that were requested by plaintiff was mostly the fault of defendant rather than defense counsel. Furthermore, although defendant contends that the court disallowed certain witnesses defendant sought to present due to defense counsel's failure to submit a witness list, defendant has not shown that the barring of the witnesses was prejudicial. The record indicated that the barred witnesses primarily would have testified with respect to plaintiff's anger problems, which would have been cumulative to other testimony presented at trial. In addition, it is clear from the record that defense counsel effectively cross-examined plaintiff's witnesses. We agree with the trial court's finding that defense counsel's representation was adequate, and conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial brought on the ground that defense counsel's representation was inadequate.

Defendant next argues that he was denied a fair and impartial trial because the trial judge was biased against him. We disagree. Although defendant orally requested that the judge disqualify herself on the first day of trial, because defendant never filed a written motion for disqualification and did not follow the procedures provided in MCR 2.003(C), this issue was not preserved for review. *Meagher v Wayne State University*, 222 Mich App 700, 725; 565 NW2d 401 (1997). Furthermore, defendant has not demonstrated any bias on the part of the trial court. Although defendant argues that the trial court's bias was shown by its acceptance of his expert witness' valuation of the marital home and rejection of the higher valuation of plaintiff's expert witness, a party cannot complain that the trial court erred in accepting the testimony of its own expert. Furthermore, contrary to defendant's argument, repeated rulings against a litigant do not demonstrate disqualifying bias. *Cain v Dep't of Corrections*, 451 Mich 470, 496; 548 NW2d 210 (1996); *Wayne Co Prosecutor v Parole Board*, 210 Mich App 148, 155; 532 NW2d 899 (1995). We therefore conclude that defendant is not entitled to a new trial because the trial judge was biased against him.

Finally, defendant argues that the trial court erred in awarding plaintiff \$10,000 in attorney fees where he was already sanctioned for the discovery violations by the striking of his expert witness' testimony regarding the value of Metro Graphic, and where no evidentiary hearing was held to determine the reasonableness of the fees requested. We disagree. A trial court's decision to award attorney fees in a divorce action is reviewed for an abuse of discretion. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). The trial court's findings regarding the reasonableness of an attorney fee is also reviewed for an abuse of discretion. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999).

Attorney fees may be awarded in a divorce action where the award is necessary to enable a party to carry on or defend the suit. MCR 3.206(C)(2); *Maake, supra*. Attorney fees may also be awarded where one of the parties has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of the litigation. *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2d 394 (1992). Here, the trial court found that plaintiff was capable of paying her own attorney fees, but that defendant's conduct unreasonably prolonged the discovery process. The court found that defendant's refusal to cooperate with discovery resulted in plaintiff incurring \$10,000 in otherwise unnecessary attorney fees.

Although defendant argues that he was already sanctioned for the discovery violations by the striking of his expert witness' testimony regarding the valuation of Metro Graphic, MCR 2.313(B)(2), which governs discovery sanctions, provides that the court "shall require the party failing to obey the order or the attorney advising the party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure." The monetary sanction may be imposed in addition to any other sanction permitted by the court rules. MCR 2.313(B)(2).

Furthermore, although a trial court ordinarily must hold an evidentiary hearing to determine reasonable attorney fees when the reasonableness of the request is challenged, a court may award attorney fees without having held an evidentiary hearing if the parties created a sufficient record to permit review of the issue and the court fully explained its reasons for its decision. *Head, supra* at 113. To determine a reasonable attorney fee, the court should consider 1) the professional standing and

experience of the attorney, 2) the skill, time, and labor involved, 3) the amount in question and the results achieved, 4) the difficulty of the case, 5) the expense incurred, 6) the nature and length of the professional relationship with the client, 7) the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the lawyer, 8) the fee customarily charged in that locality for similar services, and 8) whether the fee is fixed or contingent. *Id.* at 114; *Wood v DAIE*, 413 Mich 573, 588; 321 NW2d 653 (1982). The trial court is required to make findings of fact with respect to the attorney fee issue, but need not detail its findings with respect to each factor considered. *Miller v Meijer, Inc*, 219 Mich App 476, 479-480; 556 NW2d 479-480; 556 NW2d 890 (1996).

Here, plaintiff's counsel stated on the record that plaintiff incurred \$40,000 in attorney fees and that his hourly rate was \$300 per hour. Plaintiff's counsel was a well-known attorney and the trial judge was in the position to judge the skill, time, and labor involved in the case, the difficulty of the case, and the problems caused by defendant's discovery misconduct. Under the circumstances of this case, the record was sufficient for the determination of reasonable attorney fees caused by defendant's misconduct without an evidentiary hearing.

On cross-appeal, plaintiff argues that the trial court abused its discretion in awarding her only \$10,000 in attorney fees, rather than the \$20,000 in attorney fees she requested. However, the trial court awarded plaintiff \$10,000 in attorney fees after observing first-hand the problems caused by defendant's refusal to cooperate with discovery. While we are dismayed by the amount of attorney fees engendered by this case involving minimal assets, we find no abuse of discretion in the trial court's award.

Finally, plaintiff argues on cross-appeal that the trial court erred in failing to find defendant at fault for the breakdown of the marriage. We disagree. The trial court's findings of fact are reviewed under the clearly erroneous standard. *Sparks, supra*.

Fault in the breakdown of a marriage is a proper factor for the court to consider when dividing property. *Byington, supra* at 115. When determining fault, courts must examine the conduct of the parties during the marriage to determine "whether one of the parties to the marriage is more at fault, in the sense that one of the parties' conduct presented more of a reason for the breakdown of the marital relationship than did the conduct of the other." *Welling v Welling*, 233 Mich App 708, 711; 592 NW2d 822 (1999). Here, each party blames the other for the breakdown of the marriage. After considering the evidence presented at trial, the trial court found that the conduct of both parties contributed to the breakdown of the marriage. The trial court is in the best position to determine the extent to which each party contributed to the breakdown of the marriage, *Hanaway, supra* at 297, and we are not convinced that the trial court's finding was clearly erroneous.

We therefore affirm the trial court's property division and its order entering the judgment of divorce.

Affirmed.

/s/ Michael J. Kelly

/s/ Martin M. Doctoroff

/s/ Jeffrey G. Collins