

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS J. BENDER,

Plaintiff/Counterdefendant-
Appellee/Crossappellant,

v

TERRI LYNN BENDER,

Defendant/Counterplaintiff-
Appellant/Crossappellee.

UNPUBLISHED

December 26, 2000

No. 217781

Kent Circuit Court

LC No. 97-001008-DM

Before: Talbot, P.J., and Hood and Smolenski, JJ.

PER CURIAM.

Defendant/counterplaintiff, Terri Lynn Bender (hereinafter “defendant”) appeals from a judgment of divorce. Plaintiff/counterdefendant, Thomas J. Bender (hereinafter “plaintiff”) filed a cross-appeal. We reverse and remand for proceedings consistent with this opinion.

The parties were married on April 10, 1981, and had three children during the marriage. Prior to the marriage, plaintiff purchased a duplex. Defendant testified that the purchase was made to provide the couple with a marital home. Defendant testified that she contributed finances to the purchase of the duplex when she inherited money following the death of her grandfather, although she did not have documentation available at trial. The couple lived in the duplex for five years before purchasing a home. While plaintiff was the only acknowledged purchaser of the duplex, defendant confirmed that her name was on the mortgage when the duplex was refinanced. The parties had accumulated other assets during the course of the marriage in addition to the duplex and the marital home. Those assets included two vehicles, two business interests, a cottage, a boat, and various retirement and other assets. Although plaintiff had affairs during the course of the marriage, both parties agreed that an equal division of the marital assets should occur. However, the parties were unable to agree on whether certain assets were marital assets and the valuation of various assets. Additionally, the parties disputed whether certain assets were of a discounted value if awarded to a particular party. That is, if the retirement assets were awarded to defendant and had to be liquidated to cash, defendant would be penalized for the withdrawal, thereby reducing the assets’ value.

Plaintiff acknowledged that he held a fifty percent ownership interest in a service company and fifty percent ownership in a leasing company. However, plaintiff alleged that his

income was lower than reported on his income taxes. That is, due to bad accounting advice, he actually took a bonus when unable to do so and had to pay the money back. Additionally, although his father had never appeared on the payroll, plaintiff's father was paid \$21,000 for years of work that he had performed, but had never been paid. Plaintiff alleged that the service company was performing poorly, yet he acknowledged that they had managed to find the income to pay his father, who had previously been paid with products. Plaintiff also alleged that he was unable to work as many hours due to the emotional strain of the divorce and its impact on his relationship with his children. Therefore, although previously plaintiff and his partner had drawn an equal salary, his partner took a higher salary to reflect his increased efforts. Curiously, plaintiff acknowledged that, in years past, he had worked harder than his partner, but had never earned a higher salary. Plaintiff's partner corroborated plaintiff's testimony that the strain of the divorce and its impact on the children caused him to miss work. However, when asked if the relationship with his new girlfriend kept plaintiff from work, plaintiff's partner testified that they did not socialize and he was unaware of the status of that relationship.

A district court judge was assigned to handle the divorce trial. The parties stipulated to certain valuations. For example, the marital home was valued at \$106,000 by agreement. However, the parties disputed the valuation of a lot that was located behind the marital home. Also, the parties disputed the valuations of the cottage and businesses. The parties provided the trial court with exhibits and depositions to assist in resolving valuation determinations. The parties, family, a business partner, and experts also testified at trial. At the conclusion of trial, the trial court did not prepare a judgment of divorce. Instead, an opinion containing various findings issued. While the opinion determined valuations, it did not necessarily award the valued asset to a party. For example, the duplex was determined to be a marital asset, but only valued to the extent it had appreciated during the marriage and was not expressly awarded to a party. Additionally, defendant was a student who only worked part-time during the school year. Despite the fact that her employment was part-time, the trial court held that defendant was employed forty hours per week, year round. During closing arguments, plaintiff's counsel had requested that the court attribute income to defendant because she could work year round. However, there was no testimony to establish that defendant could maintain the household, care for the children, and continue her education while working forty hours per week, year round. Consequently, the parties brought motions for clarification of the opinion.

The trial court did acknowledge that there were deficiencies in the opinion. For example, it was intended that the duplex would be deemed part of the marital estate because the parties used the duplex as the marital home, despite the fact that it was only in plaintiff's name. Therefore, the valuation was the value minus the outstanding mortgage, leaving an equitable value of approximately \$64,000. Despite clarification from the court, the parties still could not agree on a judgment and had to move the court for additional assistance. The trial court listened to the parties argue and threatened to just sell all of the assets and divide the cash equally. *Plaintiff's counsel* objected to this course of action because it would have tax consequences. The trial court advised the parties that a new opinion would issue. A new opinion did not issue. Instead, on December 29, 1998, a "letter" was sent to the parties. As an attachment to a motion, plaintiff's counsel had prepared an asset listing and applied a valuation to each asset. The trial court merely "accepted" this document as the valuation of the assets and advised that "unless a Judgment of Divorce" was presented within thirty days, the court would *possibly* dismiss the

case. Ultimately, the trial court entered a judgment that conformed to plaintiff's asset valuation and listing despite defendant's objections that it did not comport with the trial court's findings and had detrimental tax consequences to defendant.

On appeal, both parties take issue with the asset valuations and awards of child support and alimony based on the parties' income. However, we are unable to review the issues raised on appeal. The appellant has the duty to file with the trial court all transcripts and other proceedings. *Band v Livonia Associates*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989). "We limit our review to what is presented on appeal and will not consider any alleged evidence or testimony proffered by the parties where there is no record support." *Id.*; See also *Reeves v Kmart Corp*, 229 Mich App 466, 481 n 7; 582 NW2d 841 (1998) ("a party may not expand the record on appeal."). In this case, both parties have filed a claim of appeal from the judgment of divorce, and neither party took measures to have the appellate record adequately preserved. The apparently seventy exhibits submitted at trial are not contained in the appellate record and the depositions of experts are also missing. Accordingly, we are unable to review the issues raised.

Furthermore, the trial court in this case did not make findings of fact and conclusions of law. Instead, the trial court made various contrary rulings. For example, the trial court computed defendant's income without regard to the record evidence. While it is possible that the trial court imputed income to defendant, the trial court was urged to find that defendant could work year round, there was no indication that she could or should have a full-time year round income imputed to her. Rather, it appears that the trial court, in lieu of fulfilling its obligations and complying with its intention to write a new judgment, merely adopted the convenience of plaintiff's asset listing and valuation.¹ In *Beason v Beason*, 435 Mich 791, 798; 460 NW2d 207 (1989), the Supreme Court set forth the obligations of a trial judge in a divorce:

In a divorce case, the trial judge performs two distinct functions. First, the court must find facts on the basis of the evidence presented, and then the court must exercise its discretion in fashioning a disposition. In its fact-finding role, the trial court must hear the evidence, choose which witnesses to credit when the evidence conflicts, and, pursuant to MCR 2.517, must place findings of fact on the record or in a written opinion. Upon the basis of the facts, the trial court must then make a disposition of the case. Before the advent of no-fault divorce, the ultimate dispositional ruling was whether a divorce should be granted. Today, the court still must exercise its discretion in fixing the amount of alimony or child support, in dividing property between the parties, or in modifying provisions of the divorce judgment. All of these are dispositional rulings. The trial court's disposition is of course intimately related to its findings of fact, yet it is distinct.

¹ When the trial court did make valuations, it merely adopted a valuation and did not present information regarding how the decision was reached. Additionally, the trial court never made credibility assessments regarding the business valuations, the decrease in plaintiff's income and increase in his partner's income, the sudden addition of plaintiff's father to the payroll during an alleged economic change in the business, the failure to amend income tax statements to reflect an income adjustment, and other factual information presented that clearly required a finding.

See also *Booth v Booth*, 194 Mich App 284, 289; 486 NW2d 116 (1992) (“... the trial court shall make additional factual findings supported by reasons for distributing the marital estate because the existing inadequate factual findings make appellate review of this issue impossible.”). Because of the unresolved credibility issues involved, the deficiencies in the record on appeal, and the lack of factual findings, we conclude that a new trial is warranted.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Harold Hood

/s/ Michael R. Smolenski