STATE OF MICHIGAN

COURT OF APPEALS

JOHN WEISS, SR., by his Co-Guardians, GEORGE WEISS and JOHN WEISS, JR., and his Next Friend, GEORGE WEISS,

Plaintiff-Appellee,

v

JOAN WEISS,

Defendant-Appellant.

UNPUBLISHED
May 17, 2002

No. 230830
Oakland Circuit Court
LC No. 99-630868-DO

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce. We affirm.

Defendant first argues that the trial court erred in ruling that plaintiff could institute this divorce action by and through his guardians. We disagree.

In *Smith v Smith*, 125 Mich App 164; 335 NW2d 657 (1983), this Court ruled that a mentally incompetent spouse can bring a divorce action by her guardian. This Court relied on General Court Rule (GCR) 1963, 722.2 which provided, "Actions for divorce and separate maintenance by or against incompetent persons shall be brought as provided in sub-rule 201.5." GCR 1963, 201.5(1) provided, "Whenever an infant or incompetent person has a guardian of his estate, actions may be brought and shall be defended by such guardian in behalf of the infant or incompetent person." *Id.* at 166.

The current court rules on domestic relations actions are contained in Michigan Court Rules subchapter 3.200. MCR 3.201 provides that subchapter 3.200 applies to actions for divorce. MCR 3.202(A) provides, "Except as provided in subrule (B) [relating to emancipated minors], minors and incompetent persons may sue and be sued as provided in MCR 2.201." MCR 2.201(E), relating to minors and incompetent persons, provides:

> (1) *Representation*
>
> (a) If a minor or incompetent person has a conservator, actions may be brought and must be defended by the conservator on behalf of the minor or incompetent person.

> (b) If a minor or incompetent person does not have a conservator to represent the person as plaintiff, the court shall appoint a competent and responsible person to appear as next friend on his or her behalf, and the next friend is responsible for the costs of the action.
>
> (c) If the minor or incompetent person does not have a conservator to represent the person as defendant, the action may not proceed until the court appoints a guardian ad litem . . . .

Based on MCR 3.202(A) and MCR 2.201(E), a mentally incompetent spouse can sue for divorce by his guardian or next friend. Therefore, the trial court did not err in ruling that plaintiff could sue defendant for divorce by and through his co-guardians.

Defendant next argues that the trial court erred in ruling that the six-month residency requirement of MCL 552.9 applied to this case, rather than the one-year requirement found in MCL 552.9e and MCL 552.9f. We disagree.

In *Bigelow v Bigelow*, 119 Mich App 784; 327 NW2d 361 (1982), this Court held that MCL 552.9e was implicitly repealed by the enactment of the no-fault divorce act, enacted in 1971. Because *Bigelow* remains good law, no error occurred in the application of the six-month residency requirement.

Defendant next argues that the trial court erred in finding a breakdown in the marital relationship despite the fact that plaintiff could not testify personally due to dementia. We disagree. This Court reviews a trial court's findings of fact under the clearly erroneous standard. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

As noted above, the court rules permit a guardian to file for divorce on behalf of an incompetent person. It therefore follows that the trial court must be able to determine, even without the incompetent person's testimony, that the marital relationship has broken down.

In any event, the evidence presented in this case belies defendant's argument on appeal that she wishes to live with plaintiff and that the marriage has not broken down. George Weiss testified that plaintiff's co-guardians filed for divorce on plaintiff's behalf because defendant had already moved out of the marital home leaving plaintiff, and filed a petition for divorce against plaintiff in Florida which she later dismissed only after she urged plaintiff to execute a quitclaim deed giving her his interest in the marital home. Additionally, George testified that plaintiff was upset when he learned that defendant had filed for divorce, but resigned himself to the fact, stating "there are other fish in the sea." George also testified that defendant hired an attorney who sent plaintiff a letter stating that he could either move out of the marital home or pay defendant $1,500 per month. Regardless of defendant's alleged motives, her actions reveal a breakdown of the marriage. This Court gives deference to the trial court's ability to judge the credibility of witnesses. *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998). Therefore, based on the evidence, the trial court did not err in finding that the objects of matrimony had broken down.

Defendant finally argues that the trial court's division of the equity in the marital home was inequitable. We disagree. If the trial court's findings of fact are upheld, this Court must

decide whether the dispositive ruling was fair and equitable in light of the facts. *Sparks*, *supra* at 151-152. The trial court's ruling should be affirmed unless this Court is left with the firm conviction that the division was inequitable.

In this case, the trial court made the following findings of fact with regard to the marital home:

> This home was purchased by Plaintiff with his own money in May of 1981, approximately five years prior to the marriage to Defendant. Plaintiff purchased the property for the sum of Seventy-Five Thousand ($75,000.00). At the time of the marriage of the parties, the value of the home was Eight-Five [sic] Thousand ($85,000) Dollars. The home is paid in full with no outstanding mortgage. The valuation of this home at the present time is approximately One Hundred Sixty-Five Thousand ($165,000) Dollars.

Based on these findings, plaintiff was awarded the first $85,000 from the net proceeds of the sale of the home and the balance of the proceeds was divided between the parties. The trial court's findings of fact were not clearly erroneous and the ruling was fair and equitable in light of the fact that plaintiff acquired $85,000 in equity before the marriage.

Affirmed.

/s/ Michael R. Smolenski
/s/ Janet T. Neff
/s/ Helene N. White