

STATE OF MICHIGAN
COURT OF APPEALS

MARY G. McCORMICK,

Plaintiff/Counterdefendant-
Appellant,

v

ERIC A. BRAVERMAN, Personal Representative
of the Estate of EDWARD J. McCORMICK,
Deceased,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED
May 24, 2002

No. 222415
Wayne Circuit Court
Family Division
LC No. 84-422014-DO

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

PER CURIAM.

This divorce case is before this Court for the third time following remand proceedings ordered in *McCormick v McCormick*, 221 Mich App 672; 562 NW2d 504 (1997) (*McCormick II*). As this Court noted in plaintiff's first appeal of this matter, this case is replete with "conduct and tactics which were, at times, less than admirable." *McCormick v McCormick*, unpublished opinion per curiam of the Court of Appeals, issued September 9, 1991 (Docket No. 102806) (*McCormick I*), slip op at 2. Plaintiff again appeals as of right from the trial court's decision resolving matters pertaining to the property division, alimony and attorney fees. We affirm.

Plaintiff argues that the trial court failed to comply with this Court's remand order to determine the ownership of the Henry Ruff Road property. Plaintiff asserts that defendant¹ gave this property to her pursuant to a reconciliation agreement and quitclaim deed, whereas defendant asserted before he died that the property was jointly owned. Even accepting plaintiff's version of the events, however, the trial court was authorized to include plaintiff's separate property in the property division "as appears . . . equitable under all the circumstances of the case, if it appears from the evidence . . . that the party contributed to the acquisition, improvement, or accumulation of the property." MCL 552.401. Plaintiff does not dispute that defendant contributed to the Henry Ruff Road property.

¹ Edward McCormick died in 1992, and Eric Braverman, as Personal Representative of Edward McCormick's Estate, is now the defendant in this action. For purposes of consistency and continuity with the prior proceedings, however, the term "defendant" as used in this opinion shall refer to Edward McCormick.

Furthermore, even if the agreement the parties entered into with regard to ownership of the Henry Ruff Road property is valid and enforceable, the trial court is permitted to consider whether the facts and circumstances have changed since the agreement was executed, so as to make its enforcement unfair and unreasonable. *Booth v Booth*, 194 Mich App 284, 288-289; 486 NW2d 116 (1992)². In this case, the record discloses that plaintiff invaded the marital property, spent the assets in violation of injunctive orders, refused to answer the court's questions concerning the disposal of the property, and refused to return the money. In *McCormick II*, this Court concluded that the trial court would have been permitted to award the Henry Ruff home in its entirety to defendant's estate. Under the circumstances, we hold that the trial court did not err in treating the Henry Ruff Road property as a marital asset.

Nor did the trial court err in upholding the division of plaintiff's personal injury award in the divorce judgment. We review the court's ultimate dispositional ruling to determine whether it was fair and equitable in light of the facts, reversing only if we are left with the firm conviction that the distribution was inequitable. *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997). As a general rule, a personal injury award, to the extent it represents pain and suffering as opposed to lost wages, is not marital property. *Id.* Of course, the separate property of one spouse may be awarded incident to a divorce to the other spouse under appropriately compelling circumstances. *Id.* Here, defendant asserted prior to his death that he paid the medical expenses for plaintiff's injury, and noted that he had been awarded less than one-fifth of plaintiff's settlement. Moreover, because of plaintiff's misconduct, this Court previously determined that the circuit court would be permitted to decide all questions in favor of the estate. *McCormick II, supra*. In light of plaintiff's ongoing attempts to conceal and divert assets and her refusal to return assets that she removed in this case, we are not convinced that the distribution was inequitable. *Byington, supra*.

Plaintiff also contends that the trial court erred in awarding attorney fees to defendant's estate. An award of attorney fees is authorized where the party requesting fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation. A trial court has the discretion to award such fees as are necessary and reasonable, and a court's determination in this regard will not be reversed on appeal absent an abuse of that discretion. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). The attorney for defendant's estate did not become involved in this case until after the divorce was final and defendant had died, and none of the proceedings since that time would have been necessary absent plaintiff's unreasonable conduct. The trial court did not abuse its discretion in awarding attorney fees to defendant's estate.

Finally, plaintiff argues that the trial court erred in canceling the alimony arrearage. This Court specifically ruled in *McCormick I*, that the trial court could "reexamine the alimony award if a change in the property award is necessitated." The trial court's finding of a change in circumstance sufficient to modify an alimony award is reviewed under the clearly erroneous standard. *Ackerman v Ackerman*, 197 Mich App 300, 301-302; 495 NW2d 173 (1992). As noted previously, plaintiff's misconduct in this case provided an equitable ground for the trial

² The *Booth* case dealt with an antenuptial agreement and the agreement here was executed while the parties were married. However, the reasoning in *Booth* is applicable on the facts of this case as well.

court to resolve any remaining issues in favor of defendant's estate. *McCormick II, supra*. With plaintiff's repeated instances of misconduct, there was ample evidence of new facts and changed circumstances since the alimony award was initially entered. *Ackerman, supra*. We find no clear error.

Affirmed.

/s/ Michael R. Smolenski

/s/ Janet T. Neff