

STATE OF MICHIGAN
COURT OF APPEALS

CHERI L. BROWN,

Plaintiff-Appellee,

v

ANDREW M. BROWN, JR.,

Defendant-Appellant.

UNPUBLISHED

November 23, 2004

No. 250056

Genesee Circuit Court

LC No. 00-225814-DO

Before: Donofrio, P.J., and Markey and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by right the May 30, 2003, judgment of divorce. We affirm in part, reverse in part, and remand for further proceedings.

I. Spousal Support

Defendant argues that the trial court erred in extending his spousal support obligation beyond March 2002, without considering any of the factors relevant to an award of spousal support. See *Gates v Gates*, 256 Mich App 420, 435-436; 664 NW2d 231 (2003). We disagree.

The trial court could validly modify the order of the predecessor judge because there was a hearing and a showing of good cause. MCR 3.207(C). Specifically, the September 27, 2002, order was entered after the divorce trial. At trial, plaintiff testified that defendant last gave her money for rent in February 2002, and that she had to borrow money to pay the rent for March and April 2002. Given these circumstances as well as the existence of a prior temporary order, there was a hearing and good cause supporting the modification. A full hearing was not required in order to modify the temporary order. See 1993 staff comment to MCR 3.207.

II. Cash Settlement

As her share of the property distribution, the trial court awarded plaintiff a “cash settlement” of \$100,000. On appeal, defendant challenges this award.

Defendant first argues that the trial court improperly invalidated the prenuptial agreement. We disagree. Antenuptial or prenuptial agreements¹ that govern the division of property in a divorce are generally enforceable except if: (1) it was obtained through fraud, duress, mistake, misrepresentation, or nondisclosure; (2) it was unconscionable when entered into; or (3) circumstances have changed so that it is unfair and unreasonable at the time of divorce. *Booth v Booth*, 194 Mich App 284, 288; 486 NW2d 116 (1992).

Contrary to what defendant argues, the trial court did not invalidate the prenuptial agreement. Rather, it expressly held that the circumstances surrounding its execution did not amount to fraud, recognized that the agreement protected defendant's businesses and inheritances, and awarded him all of the property protected by it.

We also disagree with defendant's claim that the \$100,000 cash settlement violated the prenuptial agreement. Only defendant's businesses and inheritances and proceeds from these assets were listed as "separate assets" entitled to protection under the prenuptial agreement. The trial court did not require defendant to invade any of these assets to pay the settlement.

But we agree that remand is required because, with respect to assets not covered by the prenuptial agreement, the trial court failed to distinguish between marital and separate property when deciding what assets were part of the marital estate subject to division, and therefore failed to render an equitable property division in recognition of defendant's separate assets.

The distribution of property in a divorce action is controlled by statute. MCL 552.1 *et seq.*; *Korth v Korth*, 256 Mich App 286, 291; 662 NW2d 111 (2003), citing *Reeves v Reeves*, 226 Mich App 490, 493; 575 NW2d 1 (1997). A trial court's first consideration when dividing property in a divorce proceeding is the determination of marital and separate assets. *Id.* at 493-494. Generally, assets earned by a spouse during the marriage are properly considered part of the marital estate and are subject to division, but the parties' separate assets may not be invaded unless one of two statutory exceptions are satisfied. *Korth, supra* at 291. Invasion of a spouse's separate estate is permissible if, after division of the marital assets, "the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party." MCL 552.23(1). In other words, invasion is allowed when one party demonstrates additional need. *Reeves, supra* at 494. Invasion of a spouse's separate estate is also permissible when the other spouse "contributed to the acquisition, improvement, or accumulation of the property." MCL 552.401; *Korth, supra* at 291-292. Under this exception, when a spouse "significantly assists in the acquisition or growth of a spouse's separate asset, the court may consider the contribution as having a distinct value deserving of compensation." *Reeves, supra* at 495. When this exception applies, the trial court may include in the property distribution such assets as appear to the court to be equitable under all the circumstances of the case. *Korth, supra* at 292.

¹ An antenuptial agreement is "[a]n agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." Black's Law Dictionary (6th ed). The terms "antenuptial agreement" and "prenuptial agreement" are synonymous. See *Mackenzie v Fritzinger*, 370 Mich 284, 290; 121 NW2d 410 (1963).

In this case, the parties were involved in a short-term marriage. They separated after living together for only nine months. The trial court did not determine what assets comprised the marital estate and what assets were the parties' separate property. Nonetheless, it awarded plaintiff \$100,000, directing that it be paid from funds that had been placed in escrow following the sale of the Golden Shores Court residence. That residence would appear to be defendant's separate property, however, because he had owned the house for many years before the marriage and plaintiff resided in the house for only nine months and clearly did not contribute to its acquisition.

Furthermore, it is not apparent that either exception to the general rule precluding invasion of separate assets applies in this case. The record shows that defendant paid all the household bills during the brief time the parties resided in the house, and plaintiff did not contribute to its improvement or growth. Moreover, because plaintiff was employed, did not appear to have significant debt, and defendant had been paying her major expenses for several years, it is not clear that she needed \$100,000 for her support and maintenance.

The trial court's failure to distinguish between separate and marital assets necessarily affected its ability to render an equitable property division that properly recognized defendant's separate assets. The goal of the court when apportioning a marital estate is to reach an equitable division in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). Each spouse need not receive a mathematically equal share, but the court must clearly explain departures from congruent divisions. *Id.* at 114-115. When dividing the estate, the court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, earning ability, age, health, needs, fault or past misconduct, and any other equitable circumstance. *Id.* at 115. "The significance of each of these factors will vary from case to case, and each factor need not be given equal weight where the circumstances dictate otherwise." *Id.*

In this case, the trial court justified awarding plaintiff \$100,000 by stating that part of the reason for the breakdown of the marriage was defendant's treatment of plaintiff's children, his refusal to share anything of economic value during the parties' marriage, that plaintiff gave up her residence to move in with defendant upon the marriage, and that defendant apparently had substantial income and would be left with a luxury home following the divorce. These findings are supported in the record and, therefore, are not clearly erroneous. *Thames v Thames*, 191 Mich App 299, 308-309; 477 NW 2d 496 (1991). But because the court never identified what assets comprised the marital estate or considered the applicability of any exception for allowing invasion of separate assets, it is not apparent that the award of \$100,000 was equitable under all the circumstances.

For these reasons, we remand for further proceedings at which the trial court shall distinguish between marital and separate property, not consider any of defendant's separate assets as part of the marital estate, and render an equitable property division that properly recognizes the parties' separate estate.

III. Attorney Fees

Defendant also challenges the trial court's decision to award plaintiff attorney fees in the amount of \$10,000. Attorney fees in divorce actions are not recoverable as of right. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). But a party to a divorce action may be ordered to pay the other party's reasonable attorney fees if necessary to enable the other party to defend or prosecute the action. *Id.*; MCL 552.13. The party requesting fees must allege facts sufficient to show that the party is unable to bear the expense of the action but the other party is able to pay. MCR 3.206(C)(2)(a); *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). Attorney fees may also be awarded or if the party requesting the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation. MCR 3.206(C)(2)(b); *Stackhouse, supra* at 445. We will not reverse a trial court's determination that attorney fees are necessary and reasonable absent an abuse of discretion. *Id.*

In this case, the trial court failed to make specific findings that attorney fees either were necessary to enable plaintiff to maintain the action or were warranted because of defendant's unreasonable conduct. Nor is the basis for the trial court's attorney fee award otherwise apparent from the record. Therefore, we remand for specific findings of fact regarding the necessity of an award of attorney fees. *Stackhouse, supra* at 446.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Karen M. Fort Hood