STATE OF MICHIGAN

COURT OF APPEALS

PAMELA S. DAUDERT,

Plaintiff-Co-Defendant-Appellant,

v

CHARLES J. DAUDERT,

Defendant-Co-Plaintiff-Appellee.

UNPUBLISHED
November 30, 2004

No. 248779
Kalamazoo Circuit Court
LC No. 02-006440-DO

Before: Whitbeck, C.J., and Jansen and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. We affirm in part, reverse in part, and remand.

Plaintiff Pamela Daudert, a legal secretary, and defendant Charles Daudert, an attorney, became acquainted through work. In 1971, defendant hired plaintiff as his legal secretary. Defendant obtained a divorce from his first wife in 1980, and married plaintiff in 1981. Plaintiff was thirty-four years old, and had not been married previously; defendant was forty-five years old. The marriage lasted for twenty-two years: at the time of trial, plaintiff was fifty-six years old and defendant was sixty-seven years old.

Plaintiff continued to work as defendant's legal secretary until 1984, when she returned to a law firm for which she had briefly worked in the past. Defendant retired in 1986 when he was fifty-one years old. Plaintiff continued to work full-time until 1987, when she obtained a part-time position that permitted her to work three days per week, with summers off; this flexible schedule enabled plaintiff and defendant to travel extensively together. Plaintiff worked part-time from 1987 until 1994, when she was laid off. The parties agreed that it would be difficult for plaintiff to get a job that would allow her the same amount of time off that her previous job allowed, and decided that plaintiff would retire at that time. For eight years, from 1994 until the time of the divorce, both parties were retired, and divided their time between their house in Kalamazoo and their condominium in Louisiana.

Before their marriage, defendant purchased two rental properties: Austin Grove Townhouses, a ten-unit townhouse project, and West Dutton Apartments, a four-unit apartment building. Before their marriage, in addition to being employed as defendant's legal secretary, plaintiff was also employed as the resident manager of Austin Grove Townhouses. Plaintiff testified that she received a $15 per month rent reduction as a perk of that job; defendant testified

that plaintiff received a fifty percent rent reduction. Defendant testified that once they were married, plaintiff had no further contact with the Austin Grove Townhouses, except in her capacity as his legal secretary. But plaintiff testified that before their marriage (as resident manager), during their marriage (as defendant's wife), and even after she stopped working as his secretary, she handled the general administration, paid the bills, interviewed prospective tenants, and signed leases for the Austin Grove Townhouses. Defendant took over those responsibilities when he retired. Despite defendant's contention that plaintiff only dealt with the townhouses in her capacity as his secretary, plaintiff testified that she handled the bookkeeping even when she was employed by the other law firm. Defendant handled construction and maintenance projects at Austin Groves, including repairs, replacements, and upgrades.

In 1989, defendant deeded the Austin Grove Townhouses from himself, individually, to himself and plaintiff, husband and wife, as tenants by the entireties with full rights of survivorship. The operating bank account of Austin Grove Townhouses was transferred by defendant to a joint bank account in the parties' names. The rental income was deposited into the joint account, and the related expenses were paid from the joint account.

Plaintiff testified that she was not as involved with the West Dutton Apartments, but that she occasionally wrote a check or signed a lease. Defendant initially represented in his answer to plaintiff's interrogatories that he believed that the West Dutton Apartments had been deeded from himself to himself and plaintiff jointly. But he also indicated that he had been unable to locate a deed reflecting such a transfer. At trial, plaintiff testified that she did not know the ownership status of the property, and defendant testified that no transfer had ever occurred.

The trial court determined that the marital estate was comprised of a house in Kalamazoo, valued at $144,000; a condominium in Louisiana, valued at $150,000; plaintiff's retirement assets valued at $61,361 (as of June 28, 2002, less her $10,000 pre-marital contribution); defendant's retirement assets valued at $342,164 (as of December 31, 2002, less his $46,500 pre-marital contribution); a sailboat valued at $1,500, as well as various bank accounts valued at $48,000.[1]

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[1] We note plaintiff's argument that the trial court erred in applying different valuation dates concerning the parties' retirement accounts. Specifically, plaintiff asserts that the figure used by the trial court to value her retirement account represents the value of the account as of June 28, 2002 ($71,361, including her $10,000 pre-marital contribution), while the figure used to value defendant's retirement account represents the lower value of that account as of December 31, 2002 ($388,664, including his $46,500 pre-marital contribution), as opposed to the higher value of that account as of June 30, 2002 ($465,800, also including $46,500 pre-marital contribution). Thus, plaintiff argues that her "retirement account value did not reflect her post-June 28, 2002 withdrawals while defendant's did."

It is well settled that "decisions regarding the time of valuation of property in a divorce action are matters within the discretion of the trial court." *Gates v Gates*, 256 Mich App 420, 427; 664 NW2d 231 (2003). Further, plaintiff did not supply the trial court with evidence to support any valuation date other than June 28, 2002, whereas defendant did. Therefore, we find no abuse of discretion in the trial court's choice of valuation dates for the parties' retirement accounts.

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The trial court awarded plaintiff marital assets valued at $351,361, including the Louisiana condominium, and $201,361 of retirement assets (comprised of $61,361 of her own assets, plus an additional $140,000 of defendant's assets by way of a Qualified Domestic Relations Order). The trial court awarded defendant marital assets valued at $395,664, including the Kalamazoo house, $202,164 of retirement assets (his assets of $342,164 less the $140,000 QDRO), bank accounts valued at $48,000, and the sailboat valued at $1,500. The trial court determined that defendant's separate property that was acquired before the parties' marriage included the Austin Grove Townhouses, valued at $432,000; the West Dutton Apartments, valued at $123,400; and a sailboat valued at $55,000. The trial court also awarded plaintiff $45,000 alimony in gross.

Plaintiff first argues that the trial court incorrectly determined that the Austin Grove Townhouses and West Dutton Apartments were defendant's separate property, and that no exception existed for invading those assets. In reviewing a trial court's property division in a divorce case, this Court must first review the trial court's findings of fact for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Draggoo*, *supra* at 429. "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 those facts. The dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *Id*. at 429-430.

The distribution of property in a divorce is controlled by statute. MCL 552.1 *et seq*.; *Reeves v Reeves*, 226 Mich App 490, 493; 575 NW2d 1 (1997). "[T]he trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets." *Id*. at 493-494, citing *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997). "Generally, the marital estate is divided between the parties, and each party takes away from the marriage that party's own separate estate with no invasion by the other party." *Reeves*, *supra* at 494. In determining which assets are part of the marital estate, the trial court should include all property that came "to either party by reason of the marriage . . . ." *Id*. at 493, quoting MCL 552.19 (emphasis omitted). This has been construed to mean the accumulation of assets "that may have occurred between the beginning and the end of the marriage." *Id*., quoting *Bone v Bone*, 148 Mich App 834, 838; 385 NW2d 706 (1986) (emphasis omitted). When the parties have commingled their separate property or used it for joint purposes, an appellate court will consider the parties' intent concerning the inclusion of the

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(…continued)

Additionally, we note that while the trial court did not specifically accord a value to the bank accounts in its opinion, plaintiff asserts that the accounts were valued at $48,000, and provided support for such a valuation in her trial exhibits. Moreover, defendant merely offers conclusory statements to refute plaintiff's valuation ("one of the accounts in question had been closed two years prior to the separation," and "appellant's attorney used different dates resulting in double accounting where amounts were transferred from one account to the other"). And we find nothing to support defendant's conclusory assertions based on a review of the exhibits produced by plaintiff. Therefore, for purposes of this appeal, we will employ plaintiff's asserted $48,000 valuation of the bank accounts.

assets in the marital estate. See *Polate v Polate*, 331 Mich 652, 654-655; 50 NW2d 190 (1951) (affirming distribution of a building to both parties although it was owned by the husband before the marriage, but transferred into both parties' names during the marriage).

Here, it is undisputed that defendant purchased the Austin Grove Townhouses and the West Dutton Apartments before the parties married. Plaintiff maintains that she "contributed to the acquisition, improvement, of accumulation of the property," and that the trial court therefore erred in failing to include them in the marital estate. MCL 552.401. Defendant, on the other hand, maintains that plaintiff's involvement with the Austin Grove Townhouses predated their marriage, and that her involvement with the property once they were married was in her capacity as his secretary. Defendant also maintains that plaintiff had no involvement whatever with the West Dutton Apartments, either before or after their marriage.

The trial court specifically found:

> [T]he appreciation of the value of Austin Grove Townhouses and West Dutton Street apartments is not a marital asset. It is separate premarital property that Plaintiff did not contribute significantly to. Whatever she did do, in terms of leasing, she was compensated for by a reduction in rent when she lived there and as the Defendant's secretary when she was working for him.
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> This Court also specifically finds that the Plaintiff did nothing to contribute to the household and marital estate which would have enabled the Defendant to invest time and effort and [sic] necessary to maintain these properties. Plaintiff did, however, enjoy the fruits of Defendant's labors in not only the incomes from these properties but also his law practice.

It is well settled that "[t]his Court gives special deference to the trial court's findings when they are based on the credibility of the witnesses." *Draggoo*, *supra* at 429. However, while the trial court noted that defendant deeded the Austin Grove townhouses "from his name, individually, to his name and the Plaintiff's name as husband and wife, as tenants by the entirety," the trial court did not specifically address whether this evidenced an intent on the part of defendant to transfer the property to the marital estate.

At trial, plaintiff testified that during their marriage, defendant "wanted the townhouses put in both names," and that defendant, an attorney, "prepared a deed that went from [his] name only to my name and his name jointly as husband and wife." Defendant maintained that the property was transferred solely for estate planning purposes. Defendant testified that when the parties were drafting their respective wills, plaintiff was concerned that a legal battle with defendant's children from his first marriage would ensue over the rental properties upon defendant's death. Defendant then transferred the property from himself to himself and plaintiff jointly, as husband and wife, as tenants by the entireties. According to plaintiff, from that point forward, defendant referred to their joint ownership of the property. At times, defendant had to have plaintiff's approval, as a beneficiary of his pension plan, to withdraw lump sums from his plan to pay for property improvements. Additionally, as joint owner, plaintiff represented the property during an eviction proceeding.

It is undisputed that defendant transferred the Austin Grove Townhouses to himself and plaintiff jointly, as husband and wife, as tenants by the entireties. We find that this evidences defendant's intent that he and plaintiff be joint owners of the property: whether defendant's motivation in transferring the property was to alleviate plaintiff's concerns regarding a probate contest with his children is irrelevant. See *Eckhardt v Eckhardt*, unpublished opinion per curiam of the Court of Appeals, issued September 9, 2003 (Docket No. 239195) (motivation for transferring property into marital estate irrelevant).[2] The fact remains that defendant, an attorney, was fully aware of the legal ramifications of transferring property, and transferred the Austin Grove Townhouses to the parties jointly as husband and wife. In so doing, defendant willingly included the property in the marital estate. See *Hightower v Hightower*, unpublished opinion per curiam of the Court of Appeals, issued July 20, 2004 (Docket No. 245725); *Cowen v Cowen*, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2001 (Docket No. 221101).[3] Based on the whole record, we are convinced the trial court made a mistake when it determined that the Austin Grove Townhouses were defendant's separate property and were not part of the marital estate.[4]

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[2] We note that this unpublished case is not precedentially binding, pursuant to MCR 7.215(C)(1).

[3] Again, we note that these unpublished cases are not precedentially binding, pursuant to MCR 7.215(C)(1). Also, our holding should not be interpreted to mean that a transfer of separate property from one spouse to both spouses jointly as husband and wife conclusively establishes that the subject property is part of the marital estate. Rather, the intent of the parties must always be examined, and in this case, we find that defendant intended to transfer the Austin Grove Townhouses into the marital estate.

Moreover, we disagree with defendant's assertion that "it is [] clear that how property is titled is meaningless." Defendant argues that *Reeves*, *supra*, stands for the proposition that even though property is titled in both parties' names, it is considered separate property where one of the parties made the down payment and mortgage payments. But defendant mischaracterizes this Court's holding in *Reeves*, *supra* at 496. There, the parties cohabitated before they were married, and the defendant husband supplied the down payment for two rental properties that were purchased in both parties' names. *Id*. at 492. This Court determined that the trial court "erred in including the entire equity value of the rental properties in the marital estate," because they "were purchased before the parties married and defendant alone supplied the down payments." *Id*. at 496. This Court held that "[t]he increase in value (whether by equity payments or appreciation) that occurred between the beginning and the end of the marriage was part of the marital estate," but that "it was error for the [trial] court to consider as part of the marital estate the increase in value (by the down payments and equity payments) that occurred before the parties married." *Id*. (internal citation omitted).

The instant case is distinguishable from *Reeves*, *supra*, in that here defendant purchased the property before the parties were married, but transferred the property to himself and plaintiff, jointly as husband and wife, as tenants by the entireties, during the course of the marriage. We find, as set out above, that this evidenced defendant's intent to transfer the property into the marital estate.

[4] Therefore, whether plaintiff helped "acquire, improve, or accumulate" the property is irrelevant, MCL 552.401, and we need not consider plaintiff's argument to that effect.

Contrary to plaintiff's assertion, we find that the trial court's valuation of the Austin Grove Townhouses at $432,000 was not clearly erroneous. The trial court determined:

> The state equalized value of the property is $197,000.00, times two, equals $394,000.00, subtracting the $15,000.00 water/sewer assessment fee would leave a value of $379,000.00 which is being asserted by the Defendant as the present value. An appraisal by C. William Hurley resulted in a market approach evaluation of $455,000.00, but could be as low as $432,000.00. Mr. Hurley pointed out, however, that the subject property contains fireplaces, and is all brick, and you do not find that now as most places would be framed. Plaintiff pointed out that Austin Grove Townhouses were renting for $575.00 on the average. This Court determines the present value of Austin Grove Townhouses to be $432,000.00.

Plaintiff argues that the trial court should have valued the Austin Grove Townhouses at a higher amount, based on the appraiser's trial testimony that at the time he prepared his written appraisal, he was not aware that there was additional land to expand and add ten additional townhouses, which could increase the value of the property by $15,000 to $20,000. Plaintiff argues that the trial court failed to address the value of the additional land, and discounted the appraiser's net appraisal of $440,000 by $8,000 to arrive at the $432,000 valuation. However, in light of the fact that the expansion had not occurred and that no expansion was planned, the trial court correctly utilized the appraiser's $432,000 to $440,000 appraisal, and selected the lower $432,000 value. We find that the trial court's valuation of the Austin Grove Townhouses was not clearly erroneous. On remand, we direct the trial court to include the property as part of the marital estate, and to award each party one-half of the value of the property accordingly.

Concerning the West Dutton Apartments, plaintiff argues that the trial court failed to consider defendant's admission in his answer to her interrogatories that he *believed* that the property had been transferred to the parties jointly, as husband and wife, even though he had been unable to locate a deed to that effect (emphasis added). But at trial, defendant testified that when he answered the interrogatories, he mistakenly believed that the property had been transferred to the parties jointly, but that he later discovered that such a transfer had not occurred. Indeed, plaintiff testified at trial that she did not know the status of that property. Therefore, we find that the trial court did not clearly err in determining that the West Dutton Apartments were defendant's separate property.

In light of both parties' testimony that plaintiff had little if any contact with the West Dutton Apartments, we find that the trial court did not clearly err in its determination that the property was not subject to invasion pursuant to MCL 552.401, because plaintiff did not contribute to the "acquisition, improvement, or accumulation of the property." *Reeves*, *supra* at 495, citing *Grotelueschen v Grotelueschen*, 113 Mich App 395, 399-400; 318 NW2d 227 (1982) (separate estate unavailable for invasion because other spouse had no involvement with that estate). We also find that the trial court did not clearly err in its determination that the property was not subject to invasion because plaintiff's efforts at home did not facilitate defendant's efforts which resulted in the property appreciating in value during the marriage. *Hanaway v Hanaway*, 208 Mich App 278, 294; 527 NW2d 792 (1995). And because the trial court properly characterized the West Dutton Apartments as defendant's separate property, we find it unnecessary to address plaintiff's argument regarding the trial court's valuation of that asset.

Plaintiff next argues that the trial court's property distribution was inequitable. The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). The division need not be mathematically equal, but any significant departure from congruence must be clearly explained by the trial court. *Id*. The trial court's disposition of marital property is intimately related to its findings of fact. *Id*. Our Supreme Court has held that the following factors are to be considered in the division of property, whenever relevant to the circumstances of the particular case:

> (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. [*Sparks, supra* at 159-160.]

Moreover, "while the division need not be equal, it must be equitable." *Id*. at 159.

A review of the record indicates that the trial court made detailed findings of fact concerning the *Sparks* factors set out above, and equitably distributed the property on the basis of those considerations. The trial court made the following findings:

> (1) "The parties have been married 22 years";
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> (2) "During the marriage, the Defendant worked as an attorney from 1981 to 1986 in his own well-established law firm, earning substantially more income than the Plaintiff. In addition, the Defendant brought in the rental incomes from Austin Grove Townhouses, and West Dutton Apartments; both of which were premarital properties. The most that the Plaintiff earned as a secretary up until her 'retirement' in 1994 was $20,000.000 per year."
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> "Clearly the Defendant has contributed substantially more financially to this marriage than the Plaintiff. The Defendant has also contributed more time and effort in the enhancement of the marital estate. The Plaintiff used her talents to decorate and furnish both homes."
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> (3) "Plaintiff is 57 years old this year, while the Defendant will be 68 years old";
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> (4) "The Plaintiff is in excellent health, although she stated that she uses beta-blockers and diuretics. The Defendant, although he has flare ups of rheumatoid arthritis, is in excellent condition for his age. He has osteoarthritis in his lower back and keeps active by exercise, which includes running, riding a bicycle, walking the dog, and sailing. Defendant is careful with his diet and avoiding stress. Defendant is concerned about being able to do the bulk of the maintenance and upkeep on the rental properties as he gets older";
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> (5) "The parties were able to travel extensively and enjoy the 'good life.' This divorce will put a damper on that as they will both have to live more within their means."

(6) "After the Defendant retired, the parties began to travel to Europe frequently. The Defendant is fluent in German and the Plaintiff attempted to learn the language. The parties ultimately began taking bicycle trips together. The Defendant often went on sailing trips, either with the Plaintiff or alone. The parties began developing different goals, aspirations, and needs. The Defendant is an extremely hard-working, competent, and skillful individual, capable of doing much of his own work on his apartment buildings, homes, and sail boat. The Plaintiff enjoys being taken care of, having a nice place to live, and enjoying the social aspects of her life. The Defendant feels that the Plaintiff takes advantage of his efforts, while the Plaintiff feels that the it is the Defendant's duty to take care of her, and that she contributes in her own way.

Each party needs a place to live. With the exception of condo fees and real estate taxes, the Law Avenue residence and Mandeville condominium are both paid for. Each party has a motor vehicle. Each residence has adequate furniture and furnishings.

Plaintiff claims, in Plaintiff's Exhibit 22, estimated expenses of $39,258.00. Included are condo repairs of $1,500.00; repairs or emergencies of $1,200.00; miscellaneous emergencies of $600.00; auto repairs and maintenance of $1,000.00; care for her dog $940.00; cell phone $540.00; athletic club $684.00; storage and rental areas $960.00; clothing and cosmetics $4,500.00; entertainment $2,600.00; gifts $1,200.00; and travel expenses $3,000.00. This Court finds a more realistic budget to be $25,000.00 to $30,000.00 to maintain her present standard of living."

(7) "Plaintiff has the skills and experience as an executive secretary to be able to, within a short period of time, get back into the job market, and at least be able to have earnings in the $20,000.000 to $30,000.00 per year range. She will be able to draw Social Security in a few years and have access to her retirement account.

Defendant has been out of the practice of law since 1986. At the age of 68, his employability with a law firm is questionable and would require the time and effort to get up to speed. The Defendant has income from rental properties of approximately $44,000.00 per year, and Social Security benefits of approximately $10,600.00 per year. Defendant may also draw from his retirement account of $388,663.00";

(8) "Both parties noticed difficulties between themselves early in the marriage. Even after the Defendant's former wife had died and his son had moved out of the home and on to college, things did not get a whole lot better. The Plaintiff believed that the Defendant was controlling and demanding and abusive. This Court did not find sufficient information to conclude that there was any physical or emotional abuse on the part of either one of these parties. Early on in the marriage, the Defendant had separated the parties' monies and accounts. Until the Defendant's alimony obligation with his first wife ended, the Plaintiff paid half of the mortgage payment on the Law Avenue residence, and the Defendant paid the other half. When the Defendant's son came to live with them, the Defendant paid

two-thirds and the Plaintiff one-third. The Defendant paid off the mortgage obligation of the Law Avenue residence in 1985.

The Defendant felt that the Plaintiff was demanding and overbearing. She was obsessive about the condition of their home and condominium and relegated him to certain rooms. The straw that broke the camel's back was when the Plaintiff did not want to return to Michigan from Louisiana when the Defendant wanted her to. He claimed that, for their anniversary, he got her a card and installed a new kitchen in the Mandeville condominium while she did nothing for him. The Defendant felt that the Plaintiff deceived him in the filing of the divorce, as well as the breaking into the Law Avenue residence in October and removal of much of the personal property.

It is the determination of this Court that both parties were at fault for the breakdown of the marital relationship. The marital relationship has broken down to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that this marriage can be preserved."

(9) "This Court finds that a fairly even division of marital assets would be fair and equitable under all the facts and circumstances."

On the basis of the trial court's findings of fact, the trial court awarded plaintiff $351,361 in marital assets, and awarded defendant $395,664 in marital assets.[5] We find that the trial court's nearly fifty-fifty disposition was fair and equitable in light of all the circumstances, and will not disturb the trial court's ruling with respect to division of these assets. *Ackerman v Ackerman*, 163 Mich App 796, 807; 414 NW2d 919 (1987).

Plaintiff next argues that the trial court erred by finding that if she returned to work after nine years of retirement, she could earn $20,000 to $30,000 per year as a legal secretary. Thus, plaintiff also argues that the trial court abused its discretion by awarding her alimony in gross of $45,000.

Whether to award spousal support is in the trial court's discretion, and we review the trial court's award for an abuse of discretion. *Korth v Korth*, 256 Mich App 286, 288 n 3; 662 NW2d 111 (2003); *Magee v Magee*, 218 Mich App 158, 161-162; 553 NW2d 363 (1996). On appeal, we review the trial court's findings of fact concerning spousal support for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). The findings are presumptively correct,

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[5] We reject plaintiff's assertion that the trial court's disposition was inequitable, especially considering the disparity when both marital and separate property were taken into account. Plaintiff was awarded $361,361 ($351,361, plus her $10,000 pre-marital contribution to her retirement account) and defendant was awarded $1,052,564 ($395,664, plus his $46,500 pre-marital contribution to his retirement account, plus $610,400 in separate property). However, "it does not matter if the division of the entire holdings appears one-sided, what is important is the division of the marital estate." *Reeves*, *supra* at 497.

and the burden is on the appellant to show clear error. *Beason v Beason*, 435 Mich 791, 804; 460 NW2d 207 (1990). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *Id*. at 804-805; *Moore*, *supra* at 654-655. "If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Moore*, *supra* at 655. The trial court's decision regarding spousal support must be affirmed unless we are firmly convinced that it was inequitable. *Korth*, *supra* at 288.

The plain language of MCL 552.23 permits a trial court to award spousal support that it determines to be "just and reasonable." Factors to be considered by the trial court in determining whether an award of spousal support is just and reasonable include:

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the health of the parties, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, and (12) general principles of equity. [*Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991).]

"The primary purpose of spousal support 'is to balance the incomes and needs of the parties in a way that will not impoverish either party.'" *Korth*, *supra* at 289, quoting *Moore*, *supra* at 654.

Here, the trial court made the following findings of fact:

> Plaintiff has requested spousal support. The Court has considered the above-referenced factors, in light of the evidence and testimony presented in this case. In the analysis as to division of property, the Court has previously addressed many of these factors.
>
> The Defendant clearly contributed substantially more to the financial wherewithal and property of these parties. This Court does not find either one to be substantially at fault for the breakdown of this marriage.
>
> The Plaintiff will be receiving a home, which is paid for, adequate furniture and furnishings, a car, her retirement account in excess of $70,000.00 as well as $140,000 from the Defendant's retirement account. The Plaintiff should be able to supplement her income by returning to work as a secretary where she should be able to earn at least $20,000 to $25,000 per year. The Plaintiff and the Defendant have led an envious lifestyle, including travel here and abroad, a home in Kalamazoo and Louisiana with a sailboat. Plaintiff will have substantially financially benefited from this marital relationship and Defendant's efforts. Plaintiff does not have the earning ability to continue to live in the lifestyle that she has been living; neither does the Defendant. Even at the age of 57, the Plaintiff must re-enter the workforce and make significant lifestyle changes. This may take some time. The Plaintiff has needs of between $25,000.00 and $35,000.00 per year.

> The Defendant, a retired attorney and having income properties, has the ability to earn substantially more than the Plaintiff. The Defendant brings in approximately $44,000.00 in rental income, but that requires his time and labor. His age and arthritis will begin to limit his ability to do that work himself, which will require incurring the expense of having it done. The Defendant has his own living expenses. However, this Court was not provided with a list. It is likely that the Defendant could earn some income at the practice of law. At 68 years of age, and having been out of the practice since 1986, re-entering into the practice of law to begin a law firm or earn substantial income is not very likely.
>
> The trial court then made the following dispositional ruling:
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> This Court finds that, under these circumstances, the Defendant should not have to be forced back into the legal profession to provide spousal support to the Plaintiff, who is 11 years younger.
>
> This Court's reasons, therefore, that the estate and effects awarded to the Plaintiff are insufficient for suitable support and maintenance of her; such that, pursuant to MCL 552.23, this Court is going to invade the separate assets of the Defendant and require the Defendant to refinance Austin Grove Townhouses and pay to the Plaintiff the sum of $45,000.00 as alimony in gross, by June 1, 2003.

Plaintiff argues that the trial court's finding that she could earn $20,000 to $30,000 per year as a legal secretary was clearly erroneous and was not supported by the record. However, the trial court admitted the deposition of Terri Sobolewski, the manager of a Grand Rapids legal staffing service, who testified that there was a large demand for experienced legal secretaries, and that a hypothetical person of plaintiff's age and experience could earn a salary of $31,000 to $35,000. Additionally, the trial court admitted statistics from the U.S. Department of Labor Bureau of Labor Statistics Occupational Outlook Handbook, which indicated that the nationwide median annual earnings of legal secretaries were $34,740 in the year 2000, with the middle fifty percent earning between $27,650 and $42,510, the lowest ten percent earning less than $22,440, and the highest ten percent earning more than $50,970. [6] Further, the handbook indicated that "salaries vary a great deal . . . reflecting differences in skill, experience, and level of responsibility," and that while "earnings are usually lowest in southern cities," "salaries of secretaries tend to be highest in . . . legal services."

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[6] We note plaintiff's argument that the trial court failed to rule on her objections to the admission of Sobolewski's deposition testimony. However, the record reveals that the trial court reserved ruling on plaintiff's objections, and indicated that its decision would be included in its opinion. And while the opinion did not specifically address plaintiff's objections, it appears that the trial court generously determined that plaintiff could command a salary of $20,000 to $30,000 based on Sobolewski's deposition testimony that she could earn $31,000 to $35,000, as well as the U.S. Department of Labor data indicating that $34,740 were the median annual earnings for legal secretaries. Moreover, Sobolewski's deposition was included in the lower court file with other documents entitled "defendant's exhibits that were offered and received during trial."

On the basis of this evidence, we are not left with a definite and firm conviction that a mistake has been made, and conclude that the trial court's finding that plaintiff could earn at least $20,000 to $30,000 per year was not clearly erroneous. Moreover, especially in light of our determination that the Austin Grove Townhouses were marital property and should be awarded to the parties equally, and that plaintiff will now receive half of the income from the rental property to supplement her income, we find that the trial court's award of $45,000 alimony in gross was fair and equitable in light of the facts of the case.

Finally, plaintiff argues that the trial court erred in failing to award her attorney fees. We disagree. There is no right to the recovery of attorney fees in a divorce action. *Kurz v Kurz*, 178 Mich App 284, 297; 443 NW2d 782 (1989). Generally, an award of reasonable attorney fees is authorized when one party is unable to bear the expense of the litigation and the other party has the ability to pay. See *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). This Court will not reverse the trial court's decision regarding attorney fees absent an abuse of discretion. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). An abuse of discretion occurs only where the result "is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Spaulding v Spaulding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). Here, we find no such abuse of the discretion afforded the trial court in determining whether attorney fees were appropriate.

Plaintiff, as the party seeking to recover attorney fees, was required to allege facts sufficient to show both that she was not in a position to bear the expense of the action and that defendant had the ability to pay. *Kosch*, *supra*. But aside from plaintiff's motion for interim attorney fees filed at the outset of the divorce proceedings, with no sum certain of attorney fees indicated therein, we were unable to locate any record evidence, either in the lower court record or in the trial transcripts, indicating the amount of attorney fees plaintiff sought, let alone evidence supporting such amount. Moreover, plaintiff merely argues on appeal that her attorney fees were "considerable."

In the judgment of divorce, the trial court held:

> The Defendant shall be obligated to continue to pay the spousal support as previously ordered until June 1, 2003. The Court has considered the Defendant's motion to reduce or terminate spousal support as well as the Plaintiff's request for attorney fees, and believes that continuing spousal support as ordered until June 1, 2003 will be an equitable trade-off.
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> ***
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> This Court has been requested to consider and award attorney fees by the Plaintiff.
>
> This Court has the authority and discretion to award attorney fees when necessary to enable a party to carry on or defend a divorce action. MCR 3.206(3)(2); *Atkinson v Atkinson*, 160 Mich App 601[, 612; 408 NW2d 516] (1987).

> This Court does not believe that, under the circumstances, an award of attorney fees in this case is equitable and, therefore, it is denied.

In sum, the trial court determined that denying defendant's motion to reduce interim spousal support from $2,050 per month to $1,200 per month and also denying plaintiff's motion for attorney fees was an "equitable trade-off." Especially in light of the fact that plaintiff has provided no evidence of the amount of attorney fees she seeks, we find that the trial court's determination that denying defendant's motion to reduce interim spousal support was an equitable solution was not an abuse of discretion.

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

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Richard A. Bandstra