

STATE OF MICHIGAN
COURT OF APPEALS

MARGARET ANN BOWSER,

Plaintiff-Appellee,

UNPUBLISHED
January 22, 2009

v

TIM HOWARD BOWSER,

Defendant-Appellant.

No. 279007
Saginaw Circuit Court
LC No. 02-044743-DM

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant Tim Bowser appeals from the parties' judgment of divorce. Tim Bowser's issues on appeal involve the property division and an award of attorney's fees to plaintiff Margaret Bowser. We affirm in part, reverse in part, and remand for further consideration of certain specified matters consistent with this opinion.

I. Basic Facts And Procedural History

The parties were married in 1977. They met when Margaret Bowser was a little over fifteen years old. Margaret Bowser moved in with Tim Bowser a year before their wedding when she was seventeen. Three children were born during the marriage, all of whom are now adults.

Tim Bowser's father was a dairy farmer who inherited 40 acres from his father and then continued to add acreage until the property, known as Bowser Farms, was 288 acres and had two houses on it. 100 percent interest in Bowser Farms Limited Partnership was held in the Tim Bowser Revocable Living Trust. 78 percent interest in the property was acquired by Tim Bowser's trust as a gift from his parents. Before 1995, it was a cow milking operation. The cows were then sold and from then onward crops were grown to be sold. The property was appraised twice: once in 2002 at \$520,000 and once in 2005 at \$600,000. An annuity payable to Tim Bowser's parents was set up in 1982 to buy a 16 percent interest in the limited partnership portion in the farm. To pay the annuity, \$1,320 was monthly taken out of a farm account into which farm proceeds were deposited and from which farm-operating expenses were paid. Margaret Bowser was obligated by a promissory note for part of the annuity fund and issued some of the checks to the annuity fund for Tim Bowser's parents. Margaret Bowser testified that she believed that she and Tim Bowser were making annuity payments in order to purchase the whole farm and that they owned the farm jointly. Margaret Bowser, along with Tim Bowser and

his parents, signed a quitclaim deed in 1991, which released Margaret Bowser's interest in the property and named Tim Bowser as sole trustee of the trust that held the property. Margaret Bowser testified that she did not read the deed before signing it, did not receive an advance copy of the document, and was not told the scope of the document.

Margaret Bowser testified that she has been working on the farm ever since she met Tim Bowser. Margaret Bowser and her daughter, Lisa Montgomery, testified that Margaret Bowser helped with the dairy farm, drove tractors, helped cultivate crops, kept the lawn, and did the bookkeeping. She did this work in addition to keeping the house, cooking, and raising the children. Tim Bowser testified that his parents, who worked the farm previously, worked right alongside each other and that he would describe his work relationship with Margaret Bowser as the same. Tim Bowser also testified that Margaret Bowser helped on the farm for five weeks during the growing season and only occasionally worked an 11- or 12-hour day.

Margaret Bowser testified that she filed for divorce because of Tim Bowser's drinking problems. In June 2002, Margaret Bowser moved from the marital home to the second house on the property with one of her daughters. Tim Bowser claims he paid almost \$13,000 from the farm account to have repairs done to that second house. In 2005, the net profit on the farm was \$7,704 and an additional \$2,193 was received from a government farm subsidy program. In 2005, Margaret Bowser took \$500 out of the farm account to reimburse herself for fixing a gas leak at the second house. Tim Bowser paid his car insurance from the farm account. During 2004 and 2005, Tim Bowser paid both his and Margaret Bowser's propane and electricity bills from farm proceeds. Replacement of tools and replacement of a tool shed after a fire were also paid from the farm account. Tim Bowser testified that Margaret Bowser left the second house with significant damage.

In 2004 and 2005, Margaret Bowser and Tim Bowser filed their taxes separately. Beginning in 2004, Tim Bowser decided to stop farming the property and he rented it out for about \$23,870 a year for two years. The proceeds from crops in 2004 and 2005 were included on Tim Bowser's income tax returns. Margaret Bowser testified that she did not pay any income taxes on those proceeds.

Regarding Bowser Farms, the trial court concluded as follows:

The Court finds that the entirety of the real property comprising Bowser Farms is a marital asset subject to equitable distribution. [Tim Bowser]'s claim that 78% of the Farm is separate property fails, due to the fact that he failed to keep any part of the [f]arm real property or farm business separate. All the evidence is that Bowser Farms was, during all times alluded-to [sic] in the record, maintained and operated as a single commercial enterprise.

Tim Bowser now appeals.

II. Division Of Assets

A. Standard Of Review

We review the trial court's factual findings for clear error.¹ "A finding is clearly erroneous if this Court, on all the evidence, is left with a definite and firm conviction that a mistake was made; the appellant bears the burden of showing that a mistake was made."² If no clear error is found, we will uphold the trial court's ultimate dispositional ruling unless we are left with a firm conviction that the property division was inequitable in light of the facts.³

B. Division Of The Farm Property

Property that is received by one spouse as an inheritance but is kept separate from marital property is generally deemed to be separate property that is not subject to division.⁴ However, the nature of a separate asset acquired by one spouse as a gift can change and become marital property if the asset is managed actively and its proceeds are used for marital purposes.⁵

The parties do not dispute that the 78 percent of the property in question was a gift from Tim Bowser's parents and held in Tim Bowser's trust. But Tim Bowser argues that the trial court erred in concluding that the whole of the farm was a marital asset subject to division. Tim Bowser asserts that the record shows that he maintained a separate 78 percent interest in the farm that was not divisible as a marital asset.

Tim Bowser relies on several cases to support his position. In *Hanaway v Hanaway*, this Court concluded that because the plaintiff solely handled the child-rearing and household duties, thereby freeing the defendant to build his family's company and increase the value of the company stock that had been gifted to him over the years by his father, the trial court erred in treating the company as the defendant's separate property.⁶ In *Reeves v Reeves*, this Court concluded that the marital estate should include the appreciation in value of separate assets that the defendant actively managed during the marriage while other passive investments should be excluded.⁷ The Supreme Court agreed with the rationale this Court applied in these cases in

¹ *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992).

² *Berger v Berger*, 277 Mich App 700, 723; 747 NW2d 336 (2008) (quotation and citation omitted).

³ *Sparks*, *supra* at 152.

⁴ *Dart v Dart*, 460 Mich 573, 584-585; 597 NW2d 82 (1999).

⁵ See, e.g., *Reeves v Reeves*, 226 Mich App 490, 495-497; 575 NW2d 1 (1998); *Hanaway v Hanaway*, 208 Mich App 278, 293-294; 527 NW2d 792 (1995).

⁶ *Hanaway*, *supra* at 293-294.

⁷ *Reeves*, *supra* at 495-497.

Dart v Dart: “We recognize that, in certain situations, a spouse’s separate assets, or the appreciation in their value during the marriage, may be included in the marital estate.”⁸

Here, it is clear that both parties actively managed the farm, which was a fully operational business, first as a cow-milking operation and then for selling cash crops. The record does reflect a dispute as to how much involvement Margaret Bowser had. Regardless, the asset was actively managed, and, analogous to the business in *Hanaway*, the proceeds were partly used for marital purposes. Tim Bowser focuses on the trust and the farm funds, asserting that they remained separate property and were not co-mingled with marital property. However, it is clear from the record that the farm account, which was funded with proceeds from the farm’s milking operation, cash crops, and rental income, was used not only to pay farm and property-related expenses, but also to pay propane, electricity, and car insurance bills for the family. Thus, the trial court did not err in concluding that the farm was not separate property, and it properly made factual findings to support this conclusion.

C. Division Of Farm Rental Income

Tim Bowser contends that the division of the \$47,740 in farm rental income from 2004 and 2005 was improper because: (1) Margaret Bowser only had a 22 percent interest in the farm and (2) the money was not available for distribution to either party because it was spent on farm-related expenses and the mutual support of the parties.

With respect to his first contention, Tim Bowser argues that, if this Court concludes that the 78 percent interest in Bowser Farms should not have been divided as a marital asset, then the 78 percent of the income from renting the farm in 2004 and 2005 should also not be divided as a marital asset. This argument fails, however, because, as concluded above, the trial court did not err in finding that the farm was not separate property.

Regarding Tim Bowser’s second contention, in concluding that \$47,740 in rental income was part of the marital estate, consisting of \$23,870 for each 2004 and 2005, the trial court reasoned that the amount had a “solid basis in the evidence.” Tim Bowser claims that the trial court clearly erred in this finding because the rental income received in 2004 and 2005 had been spent on the farm and the parties’ expenses. We disagree. First, Tim Bowser has not properly presented this argument by failing to offer any authority in support of this claim.⁹ Second, there is no dispute that the rental income for 2004 and 2005 was \$47,740, and besides presenting a tax return form for calendar year 2004, Tim Bowser presented no documentary evidence to support his claims regarding the distribution of the rental income for 2005 or regarding how he spent any of the rental income.¹⁰ Accordingly, we are not left with a definite and firm conviction that the trial court’s division of the rental income was inequitable.

⁸ *Dart*, *supra* at 585 n 6.

⁹ See *In re Indiana Michigan Power Co*, 275 Mich App 369, 376; 738 NW2d 289 (2007).

¹⁰ See *Ward v Conrail*, 472 Mich 77, 85-86; 693 NW2d 366 (2005); M Civ JI 6.01.

III. Attorney Fees

A. Standard Of Review

Tim Bowser appeals the award of attorney fees to Margaret Bowser, arguing that she is capable of paying the fees herself because she will be awarded a large sum of money and because she has higher earnings than he does. We review the trial court's grant of attorney fees for an abuse of discretion.¹¹ We review for clear error the findings of fact on which the court bases its award of fees, and we review de novo any questions of law.¹² "An abuse of discretion occurs when a court selects an outcome that is not within the range of reasonable and principled outcomes."¹³

B. Legal Standards

In general, attorney fees are not recoverable unless authorized by statute, court rule, or common law.¹⁴ In domestic relations cases, the granting of attorneys fees are authorized by statute and by court rule.¹⁵ The requesting party must allege facts to show that her or she is unable to cover the expense of the court action and that the other party is able to pay or that the fees were incurred because the other party refused to comply with a court order.¹⁶ The party should not be required to invade assets being used for support to satisfy attorney fees.¹⁷

C. Application

Margaret Bowser first argues that the award should be sustained because the cash distribution received from the divorce, which she asserts she relies on for support, cannot be invaded to cover her attorney's fees. However, evidence in the record showing that Margaret Bowser will rely on those funds for support is scarce. It is true that neither party was awarded spousal support. But the record shows that in addition to the large cash distribution coming to Margaret Bowser, she has an earning capacity commensurate with her degree and that she is employed. Margaret Bowser testified at trial that she was then making \$16.73 an hour and working 72 hours a pay period. Margaret Bowser has not provided documentation of her inability to cover expenses. Thus, Margaret Bowser did not meet her burden to show that she is unable to cover her attorney fees. Moreover, Margaret Bowser did not show that Tim Bowser was able to pay the fees as required by MCR 3.206(C)(2)(a).

¹¹ *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005).

¹² *Id.*

¹³ *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007).

¹⁴ *Reed*, *supra* at 164.

¹⁵ MCL 552.13; MCR 3.206(C); *Reed*, *supra* at 164.

¹⁶ MCR 3.206(C)(2); see also *Smith v Smith*, 278 Mich App 198, 207-208; 748 NW2d 258 (2008).

¹⁷ *Smith*, *supra* at 207.

Margaret Bowser's second argument to sustain the award is based on Tim Bowser's alleged misconduct. Even if the party requesting fees does not require financial assistance, the trial court may award attorney fees if there has been misconduct by the other party that directly resulted in the amount requested.¹⁸ In the instant case, the record shows misconduct by both parties regarding the court proceedings. Tim Bowser paid himself wages in violation of the stipulated order regarding the farm account disbursements and the trial court had to reimburse Margaret Bowser for that amount. In addition, Tim Bowser stopped documenting and reporting on proceeds from the farm operations, ignoring subpoenas because "they came so numerously [he] got tired of taking time off from work to answer them." Tim Bowser also continued to make payments from the account and did not account for them after April 2005, as required by the order. Conversely, Margaret Bowser caused extra litigation by filing a frivolous motion for support in October 2004, claiming that she was unemployed. But employment records and Margaret Bowser's 2004 tax return show that she had in fact been employed since July 2004. The motion was later abandoned. Further, like the plaintiff in *Reed v Reed*, Margaret Bowser did not establish that the fees she requested were incurred as a result of Tim Bowser's misconduct.¹⁹

Under these circumstances, we reverse and remand the trial court's award of attorney fees. On remand, the trial court must make findings regarding Margaret Bowser's financial needs and whether Tim Bowser's misconduct directly resulted in the incurrence of the fees requested.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot

¹⁸ *Reed, supra* at 165.

¹⁹ *Id.*