

STATE OF MICHIGAN
COURT OF APPEALS

BRUCE WALLACE COOK,

Plaintiff/Counterdefendant-
Appellant,

v

KAREN COOK,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED
February 18, 2010

No. 290160
Bay Circuit Court
LC No. 03-003447-DO

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order clarifying and amending a judgment of divorce. We remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

Among the assets to be evaluated and distributed in the divorce action was plaintiff's interest in a trust established by his parents. The October 3, 2006, judgment of divorce includes a provision that the parties and trial court have interpreted as indicating an even division of that asset. The judgment of divorce gives no indication concerning the value of that trust interest. While not raised by the parties, we note that failure to do was erroneous. MCR 3.211(B); *Yeo v Yeo*, 214 Mich App 598, 600-601; 543 NW2d 62 (1995); *Ritzer v Ritzer*, 243 Mich 405, 410; 220 NW 812 (1928). That type of error gives rise to these types of appeals.

Plaintiff filed a claim of appeal on October 23, 2006. One of the issues he raised was whether the trial court erred because it declined to treat the trust as plaintiff's separate asset not subject to division. This Court affirmed the trial court's decision in that regard. *Cook v Cook*, unpublished opinion per curiam of the Court of Appeals, issued December 11, 2007 (Docket No. 273837), slip op at 1-2.

On October 13, 2006, defendant filed a motion to settle the judgment and sought a determination of the value of the trust assets to be transferred to her. Defendant asserted that the trust assets subject to division totaled \$868,070.16, and she provided various documents in

support. Plaintiff's answer, filed November 13, 2006, denied that the trust interest in question was worth that amount, but he offered no alternative amount or documentation.

On February 5, 2007, while the earlier claim of appeal was pending, the trial court held a show-cause hearing, at which the court announced that it would sign an order requiring plaintiff

to produce the one-half of the money that I have figured at five eighteen six fifty-six twenty-five, based on [defense counsel's] motion and attachments; and have the investment sources of those funds or investment sources of an amount equal to those funds to issue a money payment—either draft or transfer—to either [defense counsel's] trust account or an account that is with another bank, to hold all that in trust, minus the \$84,000 . . . , whatever the change was with that \$84,000, that can go to [defendant] directly for her use. But the balance would be held in trust in one of those two accounts until the appeal has run.

The court further decreed that if plaintiff failed to arrange for such transfers in timely fashion, he would be required to serve 45 days in jail. A written order followed, specifying that plaintiff provide defense counsel with \$518,656.25, of which \$84,621.27 represented defendant's equity in the marital home, leaving \$434,034.98 to be held in defense counsel's trust account or "other suitable account" until the initial claim of appeal was decided. The latter figure falls within a few cents of half of the trust value defendant had put forward, and thus obviously reflects defendant's calculations.

On December 11, 2007, this Court issued its opinion affirming the result below, but noting a lack of clarity concerning some of the figures involved, and remanding the case to the trial court "in order to allow the court to either let stand or alter the judgment such that it comports with the court's ruling as contemplated by the court." *Cook*, unpub op at 3. Again, the value of the trust had not been determined within the divorce judgment, so that question was not at issue in that appeal.

On the eve of the hearing to settle the matters on remand, plaintiff asserted that defendant's documentation added up to a value of the trust interest to be divided of only \$700,794.70, so defendant was entitled to no more than \$350,397.35. This assertion was discussed at the hearing, but the trial court, without elaboration, announced that defendant was entitled to "four thirty-four ninety-eight," apparently accepting defendant's initial calculations at face value and referring to the sum of \$434,034.98 previously ordered to be paid into trust or escrow while the appeal was pending. The trial court's order of January 15, 2009, clarified the figures that had concerned this Court, and it set forth the final adjustment, including awards of interest and attorney fees, intended to satisfy the parties' obligations to each other. The order did not recite the value of the trust, although it presupposes the trial court's earlier conclusion as to the trust's value.

On appeal, plaintiff argues that the trial court erred in incorporating defendant's calculation concerning her interest in the trust without holding an evidentiary hearing on the matter.

II. Standards of Review

A trial court's factual findings are reviewed for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion. *Bielawski v Bielawski*, 137 Mich App 587, 593; 358 NW2d 383 (1984). Unpreserved issues are reviewed for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

"Whether a trial court followed an appellate court's ruling on remand is a question of law that this Court reviews de novo." *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007). Application of the doctrine of law of the case also presents a question of law, calling for review de novo. *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008).

III. Analysis

Defendant challenges this Court's jurisdiction to consider this issue on the ground that it is not germane to this Court's instructions when remanding the case. However, an appellant in an appeal of right from a final order is free to challenge earlier orders entered by the lower court prior to the entry of the final order. *Green v Ziegelman*, 282 Mich App 292, 301 n 6; 767 NW2d 660 (2009); *Shember v University of Michigan Med Ctr*, 280 Mich App 309, 315; 760 NW2d 699 (2008).

Normally, an appeal by right following a remand is limited to issues arising from the remand. See *Wemmer v Nat'l Broach & Machine Co*, 199 Mich App 376, 384; 503 NW2d 77 (1993). But "when a matter is remanded by an appellate court to the trial court, the trial court possesses the authority to take any action which is not inconsistent with the opinion of the appellate court." *VanderWall v Midkiff*, 186 Mich App 191, 196; 463 NW2d 219 (1990). Although determination of the amount of the trust interest was not among this Court's instructions for the remand, such a determination was not inconsistent with this Court's instruction to "either let stand or alter the judgment such that it comports with the court's ruling as contemplated by the court." *Cook*, unpub op at 3. Moreover, because the value of the trust interest to be divided had not been determined when the first claim of appeal was filed, plaintiff had no opportunity before the instant appeal to seek appellate relief in the matter.

However, to the extent that plaintiff again argues that the trust should not have been divided at all, those arguments are not properly before this Court. Because this Court earlier affirmed the trial court's decision to divide that asset, that decision now stands as law of the case, and is thus not subject to further consideration, by the trial court or this Court. See *Webb v Smith*, 224 Mich App 203, 209; 568 NW2d 378 (1997).

But the record does not show that the trial court accepted defendant's calculation concerning the value of the trust other than arbitrarily. It neither indicated that it undertook any independent review of her supporting documents, nor scrutinized or resolved why the parties' calculations stemming from apparently identical documents differed by more than \$150,000. The court thus fell short in its obligation as factfinder to "find the facts specially," MCR 2.517(A)(1), and to put "[b]rief, definite, and pertinent findings and conclusions" on this contested matter into the record, MCR 2.517(A)(2).

We therefore again remand this case to the trial court, with instructions to clarify its basis for the determination of the value of the trust interest to be divided, or for redetermination of that question. We express no opinion whether the court might properly determine plaintiff to have defaulted on this issue, or at least forfeited the opportunity to produce his own evidence, for having failed, despite having superior access to all related documentation, to present evidence apart from what defendant had, or to put forward a total by other than applying his own mathematics to defendant's documentation. We further express no opinion whether a full evidentiary hearing is required in the event of any redetermination.

Remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Mark J. Cavanagh

/s/ Alton T. Davis