

STATE OF MICHIGAN  
COURT OF APPEALS

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SUSAN MARIE ENGERMAN,

Plaintiff-Appellee,

v

MATTHEW J. ENGERMAN,

Defendant-Appellant.

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UNPUBLISHED

July 7, 2011

No. 295687

Kent Circuit Court

LC No. 06-010434-DM

Before: TALBOT, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

This highly contentious divorce proceeding is before this Court for a second time. The defendant husband originally appealed the circuit court's unequal division of marital property, and the award of spousal support and attorney fees to the plaintiff wife. In defendant's initial appeal, this Court affirmed the spousal support order, but remanded to the circuit court to make specific findings of fact regarding the value of the financial accounts encompassed in the property division. This Court instructed the circuit court to explain how it reached those values and to specify whether it considered the effects of taxation. *Engerman v Engerman*, unpublished opinion per curiam of the Court of Appeals, issued February 12, 2009 (Docket No. 281292), slip op at 3-4. This Court also instructed the circuit court to "explain the basis for its determination that plaintiff was entitled to attorney fees" and to make findings of fact "regarding either plaintiff's ability to pay or the delays in litigation defendant caused." *Id.*, slip op at 5. Because the circuit court failed to follow this Court's instructions, we remand once again for proceedings consistent with this opinion.

On remand from this Court's 2009 opinion and order, the circuit court continued to award defendant a severance package and stock options that he earned during the course of the marriage. The court determined that:

The full value of the stock options of \$247,252 should be credited to [defendant's] side of the ledger. . . . Similarly [defendant] received a severance package of \$32,000 . . . and that package was also kept by [defendant]. That should also be included as his asset. These assets total \$279,252.

The "full value" used by the circuit court was intended to represent the pre-tax gross value of the stock options and severance package despite the fact that defendant had already paid the taxes and tax penalties on the proceeds from these assets. The circuit court based its decision on

defendant's fault in causing the breakdown of the marriage and in prolonging the divorce proceedings, as well as his reprehensible treatment of plaintiff. The court further found that defendant had secretly exercised the stock options, sold the stock and "used the funds for his own benefit." The court also continued to award the parties' remaining financial assets, with a pre-tax gross value of \$451,931, to plaintiff. The court noted that this amounted to a 62/38 allocation in favor of plaintiff. In relation to all the financial assets, the court indicated that it relied on the values provided by the only expert witness, Dennis DeKok, who was hired by plaintiff.

In relation to attorney fees, the court found "that virtually all of the assets awarded to [plaintiff] are relatively illiquid [sic] and would have significant tax consequences if [plaintiff] were forced to liquidate them for payment of her attorneys' fees." The court further noted that defendant's "persistent obstruction and non-cooperation" caused plaintiff to incur otherwise unnecessary legal fees. Given the disparity in the parties' incomes, the court found that defendant should pay \$38,000 towards plaintiff's attorney fees.

Defendant again appeals the circuit court's division of property and the award of attorney fees to plaintiff. We agree that the circuit court committed clear error in valuing the financial assets awarded to defendant. Accordingly, we remand to the circuit court for further review consistent with the instructions provided in this opinion. We retain jurisdiction to ensure that the circuit court resolves this matter expeditiously to prevent the continued waste of the marital estate on legal fees. Both parties have been less than cooperative in explaining the true values of the marital financial assets and the circuit court has made cursory and inaccurate findings of fact on the record. These errors have unreasonably extended this litigation to the detriment of the parties and the court system.

## I. PROPERTY DIVISION

Defendant challenges the circuit court's division of marital property. In relation to a property division, we review the trial court's findings of fact for clear error. We then examine whether the division is "fair and equitable in light of the facts." *Olson v Olson*, 256 Mich App 619, 622; 671 NW2d 64 (2003). A finding of fact is clearly erroneous, if after reviewing all the evidence, this Court "is left with the definite and firm conviction that a mistake has been made." *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). In considering whether the trial court committed clear error, we must give "special deference" to its assessment of the credibility of the witnesses. *Id.* "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. A property division need not be mathematically equal in order to be equitable "as long as there is an adequate explanation for the chosen distribution." *Washington v Washington*, 283 Mich App 667, 673; 770 NW2d 908 (2009). In *Sparks v Sparks*, 440 Mich 141, 158-159; 485 NW2d 893 (1992), our Supreme Court held that a trial court has "broad discretion" to fashion an equitable property division based on a consideration of the following factors:

- (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.

There may even be additional factors that are relevant to a particular case. For example, the court may choose to consider the interruption of the personal career or education of either party. The determination of relevant factors will vary depending on the facts and circumstances of the case. [*Id.* at 159-160 (internal citation omitted).]

“As a prelude to [a] property division, a trial court must first make specific findings regarding the value of the property” involved in the divorce dispute. *Olson*, 256 Mich App at 627. The “court’s valuation of an asset is a finding of fact” that we review for clear error. *Lesko v Lesko*, 184 Mich App 395, 403 n 3; 457 NW2d 695 (1990). Generally, it is within a trial court’s discretion to consider tax consequences when valuing property. *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993). If there is sufficient evidence to calculate the taxes without resorting to speculation, the court may do so in valuing the asset. *Id.* In *Hanaway v Hanaway*, 208 Mich App 278, 300-301; 527 NW2d 792 (1995), for example, this Court affirmed the trial court’s decision against weighing tax effects in valuing the defendant’s stocks. This Court found “no clear error or abuse of discretion,” because the parties were not planning a “sale or other taxable event” in the foreseeable future. *Id.*

In this case, it is not disputed that defendant already liquidated the stock options and collected his severance package, and already paid taxes on the proceeds. Thus, sufficient information exists in the record for the circuit court to calculate the after-tax value of these assets without speculation. Accordingly, the circuit court committed clear error in valuing defendant’s assets on a pre-tax basis. See *Nalevayko*, 198 Mich App at 164. We instruct the circuit court to *correctly value these marital assets on an after-tax net basis*.<sup>1</sup>

The circuit court also clearly erred in assigning a gross value to defendant’s assets that was not based on the record evidence.<sup>2</sup> We instruct the circuit court to avoid making the same errors on remand and to *carefully consider the record evidence before assigning an after-tax value* to defendant’s stock options and severance package. To assist in that endeavor, we note that the after-tax net values assigned by DeKok consider only federal, and not state, taxes. Defendant has already paid state taxes on these assets and may present his state tax forms into evidence to establish the actual value. We further recommend that the circuit court ease its burden on remand by ordering both parties to prepare detailed proposed findings of fact regarding their assets and incomes, including mathematical calculations.

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<sup>1</sup> The circuit court correctly valued plaintiff’s financial assets on a pre-tax gross basis because plaintiff has not stated her intent to liquidate these assets and any calculation of the tax consequences would be purely speculative.

<sup>2</sup> The circuit court apparently relied on plaintiff’s proposed findings of fact to assign a gross value to defendant’s stock options at \$247,252 and severance package at \$32,000. However, the actual gross values of these assets are \$285,371.18 and \$30,416 respectively. Those values are supported by the documentary evidence, DeKok and defendant’s testimony at trial, and by our independent review and calculation.

Although we find that the circuit clearly erred in its valuation of the marital assets, we confirm that the court has discretion to divide the estate unequally in order to reach an equitable result. The goal of property division “is to reach an equitable distribution of property in light of all the circumstances.” *Berger v Berger*, 277 Mich App 700, 716-717 (2008). In reaching that goal, the court may consider the factors outlined in *Sparks* as well as any other relevant facts. *Id.* at 717. The court need not consider each factor equally, but must not place disproportionate weight on any one factor. *Id.* at 717, 721.

The circuit court cited various grounds to support the unequal division of property in this case and may continue to rely on those grounds on remand. The court noted that plaintiff had sacrificed her career to stay home and raise the parties’ children. As a result, defendant was able to focus on his career and increase his experience and earning potential. The court found that plaintiff’s financial needs were greater than those of defendant as she was left to maintain the marital home and was tasked with the ongoing support of the parties’ college-aged children. Further, the court noted that plaintiff had shown extreme “effort and diligence” to quickly rise to a position in which she earned \$55,000 a year. Plaintiff’s future advancement was limited while defendant, who then had a base salary of \$200,000, had the potential of earning much more in the future.<sup>3</sup> The court noted that the parties’ economic situation had been improved during the marriage in part because of generous financial gifts from plaintiff’s parents. These were all proper considerations in evaluating the equitability of the proposed property division pursuant to *Sparks*.

In this case, however, the circuit court must be wary not to place undue weight on the element of fault. It is well established that the circuit court must divide marital property to achieve equity, not to punish a party for alleged wrong-doing. See *Sands v Sands*, 442 Mich 30, 36; 497 NW2d 493 (1993) (“A party’s attempt to conceal assets is a relevant consideration, but it is only one of many facts that the court must weigh.”); *Berger*, 277 Mich App at 722 (remanding to the circuit court where the division of property was driven by the court’s assessment of “fault” based on the defendant’s extramarital affair). Yet, it is also well established that a circuit court may credit assets that actually have been dissipated or that were concealed toward the offending party’s portion of the marital estate. *Woodington v Shokoohi*, 288 Mich App 352, 368; 792 NW2d 63 (2010), citing 2 Michigan Family Law (6th ed, 2008 supp), Property Division, § 15.21; *Washington*, 283 Mich App at 674. The circuit court must carefully balance these principles.

Here, the circuit court indicated that “virtually all of the fault for the breakdown of the marriage lies with [d]efendant.” The court cited defendant’s extramarital affair, his “narcissistic

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<sup>3</sup> We reject defendant’s challenge to the circuit court’s factual findings regarding the parties’ earning capacities. Contrary to defendant’s argument, the spousal support award is only a temporary remedy to equalize the parties’ incomes and plaintiff will need an equitable share of the marital assets to support herself in the future. Further, the circuit court did not clearly err in finding that plaintiff’s current earning ability is fairly static while defendant’s earnings have the potential for growth.

behavior” in rejecting plaintiff’s efforts to reconcile the marriage and his testimony and actions that belittled the contributions plaintiff made to the family. The court found that defendant had verbally and emotionally abused plaintiff at the end of their marriage. The court also found plaintiff’s testimony to be more credible than that of defendant. The circuit court determined that defendant secretly converted the stock options and severance package for his own use. The court’s factual determinations are supported by the record. For example, defendant admitted that he used a portion of the stock option proceeds to purchase a new wardrobe after he donated his clothing from the marital residence to charity. Defendant purchased new furnishings and exercise equipment for his new home despite plaintiff’s offer to divide the contents of the marital home. There is also record indication that defendant used stock option proceeds to purchase a lavish vehicle for the parties’ teenage son over plaintiff’s objection. The remaining factual findings are based on the circuit court’s assessment of the parties’ credibility, an issue within that court’s sound discretion. *Draggoo*, 223 Mich App at 429. On remand, we instruct the circuit court to *carefully avoid placing disproportionate weight on the issue of fault*.

After correcting the valuation of the parties’ assets and carefully considering all relevant factors, the circuit court must reach an equitable division of the marital property. When the parties’ assets are valued pre-tax, as originally determined by the circuit court, plaintiff is awarded 62% of the property while defendant received 38%. If defendant’s stock options and severance package are correctly valued in light of the taxes that defendant actually paid, the division of property is closer to a 70/30 split in plaintiff’s favor. Such a disparate division of property is not *per se* an abuse of discretion. However, the court may not give disproportionate weight to a party’s “fault” such that the unequal division of property serves as a punishment. *Sparks*, 440 Mich at 160 (holding that “[t]he trial court erred in assigning disproportionate weight to” a party’s fault and, therefore erred in dividing the property 75/25 in the husband’s favor); *Berger*, 277 Mich App at 721-722 (holding that a 70/30 division was inequitable when based solely on one party’s extramarital affair). On remand, we instruct the circuit court to *specifically indicate its intended property division, explain why the particular property division is equitable, and explain how it mathematically effectuated the division*.

## II. ATTORNEY FEES

Defendant also continues to challenge the circuit court’s award of attorney fees. We review a trial court’s award of attorney fees in a divorce action for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). A trial court’s findings of fact regarding an award of fees are reviewed for clear error. *Id.* When reviewing an award of attorney fees in a divorce action, we must remember that the fees “are awarded only as necessary to enable a party to prosecute or defend a suit.” *Woodington*, 288 Mich App at 370. “The property division and the award of attorney fees function in tandem” in this regard. *Id.* (internal quotation omitted). Accordingly, a court must consider whether a party’s share of the marital assets would be sufficient both for her support and the payment of her legal fees, rather than assuming that a separate attorney fee award is required. *Id.* In this case, the circuit court must be cautious not to inequitably reduce defendant’s share of the marital estate through its disparate property division in addition to the award of attorney fees. We further caution the circuit court against using the attorney fee award as another method of “punishing” defendant for his “wrong doing.”

MCR 3.206(C) provides for the award of attorney fees in a divorce action as follows:

(1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, and that the other party is able to pay, or

(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

On remand, the circuit court found that plaintiff was “unable to bear the expense of the action” because the assets awarded to her were “relatively illiquid [sic] and would have significant tax consequences if [plaintiff] were forced to liquidate them.” The circuit court also found that the attorney fees incurred by plaintiff were “significantly greater than they should have been as a result of the persistent obstruction and non-cooperation by [d]efendant.” The circuit court’s findings on remand are not clearly erroneous. The record reveals that defendant was uncooperative during discovery and that he openly threatened to prolong the proceedings. Such obstructionist behavior surely increased plaintiff’s legal fees. Further, the record shows that defendant earns more on an annual basis than plaintiff even when her spousal support award is considered. Accordingly, based on income standing alone, the circuit court could reasonably determine that defendant is able to pay while defendant is not.

The current case is akin to *Kurz v Kurz*, 178 Mich App 284, 298; 443 NW2d 782 (1989), in which the court based its award of attorney fees on defendant’s limited means of support and poor health, in comparison to plaintiff’s greater earning potential and financial means. The *Kurz* Court held that the trial court implied through these factual findings that the award was necessary to permit the defendant to defend the action. *Id.* Similar to the plaintiff in the current case, the *Kurz* defendant’s property award was “not subject to ready liquidation.” *Id.* at 298. As in *Kurz*, the current plaintiff should not be required to invade her property award and substantially decrease the assets’ values in order to pay her counsel. *Id.*<sup>4</sup>

There is also reason to distinguish the current case from *Kurz*. Given the disparity of the current property division, it is not readily apparent that plaintiff’s assets would be unfairly

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<sup>4</sup> We note that defendant has not challenged the reasonableness of plaintiff’s attorney fees or the amount awarded by the circuit court. Accordingly, it was unnecessary for plaintiff to present evidence regarding her legal bills or for the circuit court to making specific findings in that regard.

reduced if she were required to liquidate a portion to pay her legal fees. On remand, we instruct the circuit court to *explain whether it would be inequitable to require plaintiff to liquidate a portion of her marital assets*. The circuit court is similarly instructed to *review defendant's portion of the marital estate to determine whether this additional financial onus inequitably reduces his share*.

We vacate the circuit court's property division and award of attorney fees. We remand to the circuit court for further proceedings consistent with the instructions provided in this opinion. We retain jurisdiction to ensure that the circuit court makes adequate findings of fact on the record and based on the evidence to support its valuation of the assets, the ultimate division of the marital property, and the award of attorney fees.

/s/ Michael J. Talbot  
/s/ Elizabeth L. Gleicher  
/s/ Michael J. Kelly

# Court of Appeals, State of Michigan

## ORDER

Susan Marie Engerman v Matthew J. Engerman

Docket No. 295687

LC No. 06-010434-DM

Michael J. Talbot  
Presiding Judge

Elizabeth L. Gleicher

Michael J. Kelly  
Judges

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Pursuant to the opinion issued concurrently with this order, this case is REMANDED to the circuit court for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 21 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, *Engerman v Engerman*, the circuit court is directed to make findings of fact regarding the after-tax value of assets awarded to defendant in the property division. The circuit court is further directed to make specific findings regarding the equitability of the property division, including the mathematical computations used to reach that equitable division. The circuit court shall also make specific findings regarding the effect of the attorney fee award on the equitable division of the property. The proceedings on remand are limited to these issues.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, defendant-appellant shall file with this Court copies of all orders entered on remand. Defendant-appellant shall cause a transcript of any hearing on remand to be prepared and filed within 21 days after completion of the proceedings.

The parties may file supplemental briefs in this Court that address the issues on remand within 21 days after the entry of the trial court's opinion or within 21 days after the transcript of the proceedings on remand is filed with the trial court clerk, whichever is later.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

JUL 07 2011

Date

  
Chief Clerk