STATE OF MICHIGAN

COURT OF APPEALS

ANN MARIE BAKER BRUSACH, Plaintiff-Appellant,	UNPUBLISHED October 17, 2017
v	No. 334550 Van Buren Circuit Court
BRIAN DAVID BRUSACH, Defendant-Appellee.	LC No. 15-640909-DM

Before: MURRAY, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Plaintiff, Ann Marie Baker Brusach, appeals by right the judgment of divorce awarding defendant, Brian David Brusach, $2,000 a month in spousal support for 48 months and dividing various pieces of property between the parties. We affirm.

On appeal, plaintiff first argues that the trial court improperly included $402,035, which represented a gift, as marital property. "In any divorce action, a trial court must divide marital property between the parties and, in doing so, it must first determine what property is marital and what property is separate." *Cunningham v Cunningham*, 289 Mich App 195, 200; 795 NW2d 826 (2010). "[T]his Court reviews for clear error a trial court's factual findings on the division of marital property and whether a particular asset qualifies as marital or separate property." *Hodge v Parks*, 303 Mich App 552, 554; 844 NW2d 189 (2014). "Findings of fact are clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made." *Woodington v Shokoohi*, 288 Mich App 352, 357; 792 NW2d 63 (2010). "Generally, marital assets are subject to being divided between the parties, but separate assets may not be invaded." *Id.* at 358. Marital property is generally "that which is acquired or earned during the marriage, whereas separate property is that which is obtained or earned before the marriage." *Cunningham*, 289 Mich App at 201. However, the distinction between marital property and separate property is not always so clear. *Id.*

"While income earned by one spouse during the duration of the marriage is generally presumed to be marital property, there are occasions when property earned or acquired during the marriage may be deemed separate property." *Id.* (citation omitted). Examples of these occasions include "an inheritance received by one spouse during the marriage and kept separate from marital property" and "proceeds received by one spouse in a personal injury lawsuit meant

to compensate for pain and suffering, as opposed to lost wages." *Id*. Nevertheless, "separate assets may lose their character as separate property and transform into marital property if they are commingled with marital assets and treated by the parties as marital property." *Id.* (quotation marks and citation omitted).

In this case, the trial court assumed, without deciding, that there was a gift from plaintiff's father to plaintiff in the form of a reduced price when plaintiff purchased the veterinary practice. The trial court then found that any gift lost its separate identity and became a marital asset. Plaintiff purchased the practice during the marriage, and marital funds were used to pay for the practice. Defendant performed various maintenance work, repairs, and updates at the practice. Defendant also maintained the washers and dryers in the work areas, and there was a continual list of tasks at the practice for him to complete. Plaintiff testified that defendant was "a great fix-it guy" and that he performed services such as unclogging sinks and hanging pictures on the wall. Further, income from the practice was commingled with the marital estate. Although plaintiff testified that defendant "wasn't involved with the mechanics" of purchasing the final portion of the practice in 2012, she also testified that she "thought we were a team and together and doing that as a family." To the extent that there was a gift solely to plaintiff in the form of a reduced purchase price, we are not left with a definite and firm conviction that the trial court made a mistake in finding that the gift lost any characteristic of being separate property. *Woodington*, 288 Mich App at 357.

According to plaintiff, separate property may be considered marital property only if one of two exceptions apply, i.e., MCL 552.23(1) or MCL 552.401. However, plaintiff's argument fails to recognize the distinction between invading a parties' separate estate and a finding that a separate asset lost its character as separate property. See generally *Cunningham*, 289 Mich App at 200-206 (noting that "separate assets may lose their character as separate property and transform into marital property" under certain circumstances; discussing whether workers' compensation benefits constituted marital property; concluding that such benefits received for wages lost before or after the marriage were separate rather than marital property; and then noting that "[a] court could, however, invade that property in appropriate circumstances" under MCL 552.23 or MCL 552.401). Thus, plaintiff's argument is misplaced.

Next, plaintiff argues that the trial court erred by including her personal goodwill in the veterinary practice as part of the marital estate. "In cases where marital assets are valued between divergent estimates given by expert witnesses, the trial court has great latitude in arriving at a final figure." *Stoudemire v Stoudemire*, 248 Mich App 325, 338-339; 639 NW2d 274 (2001). This Court has held that no "single method should uniformly be applied in valuing a professional practice" and that review of the trial court's valuation method is for clear error. *Kowalesky v Kowalesky*, 148 Mich App 151, 155; 384 NW2d 112 (1986).[1]

In general,

[1] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority." *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012).

> goodwill is "[a] business's reputation, patronage, and other intangible assets that are considered when appraising the business, [especially] for purchase; the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets." Black's Law Dictionary 763 (9th ed. 2009). Simply stated, goodwill is "an asset of recognized value beyond the tangible assets of [a business]." Taylor v. Taylor, 386 N.W.2d 851, 857 (Neb. 1986). [*McReath v McReath*, 335 Wis 2d 643, 661-662; 800 NW2d 399 (Wis, 2011) (alterations in original).[2]]

There are different types of goodwill when dealing with a professional practice: "Professional goodwill is the goodwill that is attendant to a professional business," and, "for the purpose of property division, some courts and scholars divide professional goodwill into two components: 'personal goodwill' and 'enterprise goodwill' " *Id*. at 650 n 3. As the Wisconsin Supreme Court explained:

> When professional goodwill is so divided, enterprise goodwill is characterized as [g]oodwill in a professional practice . . . attributable to the business enterprise itself by virtue of its existing arrangements with suppliers, customers or others, and its anticipated future customer base due to factors attributable to the business. Personal goodwill, on the other hand, is characterized as the goodwill that is attributable to the individual owner's personal skill, training or reputation, i.e., it is the goodwill that depends on the continued presence of a particular individual. [*Id*. at 667 (quotation marks and citation omitted; alterations in original).]

Jurisdictions have taken different approaches regarding the issue of professional goodwill. See, e.g., *May v May*, 214 W Va 394, 400-405; 589 SE2d 536 (2003) (discussing three approaches used by different states: (1) states that make no distinction between enterprise and personal goodwill and hold that both constitute marital property, (2) states holding that neither enterprise nor personal goodwill constitutes marital property, and (3) states that distinguish between enterprise and personal goodwill and hold that only enterprise goodwill is marital property).

Plaintiff urges this Court to adopt a bright-line rule in excluding personal goodwill in a professional practice from the marital estate. More specifically, plaintiff argues that the value of her personal goodwill should be excluded from the marital estate because (1) personal goodwill is the equivalent to the future ability to earn, which is excluded from the marital estate, and (2) including personal goodwill in the marital estate counts the same dollars twice, i.e., it constitutes "double dipping" given that future earning potential is factored in the spousal support analysis. Double dipping can generally be "understood as counting the same income stream twice—first as an asset for the division of property and then again for the determination of spousal support. The principle has most often been applied to pensions and similar type assets that are essentially

[2] Although not binding, caselaw from other states may be considered persuasive authority. *Travelers Prop Cas Co of America v Peaker Servs, Inc*, 306 Mich App 178, 188; 855 NW2d 523 (2014).

income streams." Note, *"Double Dipping": A Good Theory Gone Bad*, 25 J Am Acad Matrim Law 133, 133-134 (2012).

In *Loutts v Loutts*, 298 Mich App 21, 25-31; 826 NW2d 152 (2012), this Court addressed a double-dipping argument in the context of the amount of spousal support. This Court noted that it had "previously addressed double-dipping in the context of pensions" and explained that those issues were resolved on a case-by-case basis. *Id*. at 28-29. Given that "[s]pousal support does not follow a strict formula" and that "there is no room for the application of any rigid and arbitrary formulas when determining the appropriate amount of spousal support," this Court "decline[d] to adopt a bright-line rule with respect to 'excess' income and h[e]ld that courts must employ a case-by-case approach when determining whether 'double-dipping' will achieve an outcome that is just and reasonable within the meaning of MCL 552.23(1)." *Id*. at 30 (quotation marks and citation omitted). This Court went on to explain that the trial court improperly "determined that the value of a business may be used for the purpose of *either* property distribution *or* spousal support, but not both." *Id*. at 31. Such a determination was error because it resulted in "applying a bright-line test and failing to consider the specific facts and circumstances of th[e] case." *Id*. Thus, the Court remanded the case and directed the trial court to redetermine spousal support, including "whether the equities in this case warrant utilizing the value of [the business] for purposes of both property division and spousal support." *Id*.[3] Accordingly, there is no bright-line rule for whether the value of a business can be used in determining property distribution and awarding spousal support.

Here, the trial court's valuation was within the range established by the experts at trial. The trial court determined that the value of plaintiff's veterinary practice was $1,305,500, which was the average of the practice's value under the income approach and the market approach, as determined by defendant's expert. Defendant's expert testified that professional practices, such as a veterinary or dental practice, are "bought and sold based on the idea of transferability," that "[t]hey are paid a price assuming that they can transfer their customer relationships over to a new person," and that the "transferable goodwill would be included in any transactional price." Plaintiff's expert testified that a typical transaction of a veterinary practice included personal goodwill in the price. The facts that the adopted valuation was based on transferability and the price at which the practice could be sold and that plaintiff's expert testified that personal goodwill was included in a typical sale price of a veterinary practice undercut any need to distinguish between personal and enterprise goodwill in this case. See *McReath*, 335 Wis 2d at 667-668; see also generally *Kowalesky*, 148 Mich App at 157 ("Since it appears that plaintiff would continue the dental practice, the valuation of the practice should be the value of the

[3] On appeal, plaintiff acknowledges *Loutts* but merely indicates that it is "unfair and illogical" and "is not based on statute, Michigan Supreme Court precedent, or fairness." The Court in *Loutts* based its reasoning on other published cases from this Court analyzing spousal support under MCL 552.23. To the extent that plaintiff's argument could be construed as an argument that *Loutts* was wrongly decided, we deem it abandoned given plaintiff's cursory treatment. See *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Further, *Loutts* is binding on this Court under MCR 7.215(J)(1).

practice to plaintiff as a going concern"). Thus, the trial court did not clearly err in determining the value of the practice, and it did not err in concluding that there was no need to distinguish between personal and enterprise goodwill in this case. See *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994) (explaining that "where a trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present"); *Kowalesky*, 148 Mich App at 155-156.

Finally, plaintiff argues that the trial court erred in awarding defendant spousal support. "It is within the trial court's discretion to award spousal support, and we review a spousal support award for an abuse of discretion." *Loutts*, 298 Mich App at 25. "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Id*. at 26 (quotation marks and citation omitted). "The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case." *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336 (2008). "Michigan's statute governing spousal support favors a case-by-case approach to determining spousal support." *Loutts*, 298 Mich App at 29.

Although "a trial court's decision to award spousal support is not subject to any rigid formula and should reflect what is reasonable and just under the circumstances of each case," there are several factors a trial court should consider. *Cassidy v Cassidy*, 318 Mich App 463, 475; 899 NW2d 65 (2017). These factors include the following:

> (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 parties' health, (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, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).]

Fault is merely one of the factors to consider and is not dispositive. See *Cassidy*, 318 Mich App at 478 (explaining, in the context of distribution of the marital estate, that "[m]arital misconduct is only one factor among many and should not be dispositive" and that "fault should be considered in conjunction with all the other relevant factors" rather than as "a punitive basis for an inequitable division") (quotation marks and citations omitted).

Here, the parties were in their mid-40s, the length of the marriage was 20 years, and they were in good health and planned to continue working. The trial court found that although plaintiff had some fault in causing the breakdown of the marriage, defendant was more at fault for the divorce. This finding is unchallenged on appeal. Further, it is undisputed that plaintiff had far more of an ability to pay alimony than defendant did. In 2014, plaintiff made over $370,000, and defendant's income was approximately $70,000. The parties agreed to a distribution of some of their assets, and the trial court divided other assets at trial. Plaintiff was awarded her veterinary practice, which was a substantial source of income, and defendant was

awarded his pension and the marital home. The trial court noted that it awarded plaintiff more than 50% of the marital estate. The parties had a high standard of living during the marriage. As the trial court noted, although plaintiff had a much higher income, both parties contributed to the marital estate, and they worked together in earning money and raising children. The marital home was built on land from defendant's father, and defendant helped with maintenance, repairs, and updates at the clinic.

With respect to needs, defendant testified that he could afford the marital home without spousal support, but he indicated that he needed spousal support based on other expenses.[4] Defendant testified that his total monthly expenses were $6,267, which the trial court found exceeded his monthly pay of approximately $4,460. On appeal, plaintiff argues that there was no evidence of need once child support was considered; however, plaintiff fails to specifically identify what expenses of defendant would be covered by child support. See *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) (explaining that "[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority" and that "[a]n appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue") (citations omitted). Moreover, the trial court acknowledged that some of defendant's expenses included expenses for the children and that he would receive child support from plaintiff.

Defendant calculated spousal support at and requested $3,298 a month; however, the trial court awarded substantially less, $2,000 a month, and limited the award to 48 months given the above factors.[5] Given the income disparity, the prior standard of living, and fault, awarding spousal support but limiting it to 48 months was within the range of reasonable and principled outcomes. Therefore, the trial court did not abuse its discretion. *Loutts*, 298 Mich App at 25-26; *Berger*, 277 Mich App at 726.

We affirm.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Jane E. Markey

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[4] Plaintiff's statement of the issue presented and argument for this issue assert that defendant did not request spousal support; however, defendant clearly requested spousal support.

[5] In the trial court's discussion of spousal support, it cited *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991), which outlined 13 factors to consider. The trial court analyzed 12 factors from *Thames* and considered fault, the 13th factor in *Thames*, within its analysis of the past relations and conduct of the parties. Since *Thames*, the list of factors has been expanded to include "the effect of cohabitation on a party's financial status." *Olson*, 256 Mich App at 631. The trial court considered whether the parties were cohabitating with anyone when it considered the present situation of the parties.