

STATE OF MICHIGAN
COURT OF APPEALS

DAVID Y. ELLIS,

Plaintiff/Counterdefendant-
Appellee/Cross-Appellant,

v

KRISTAN M. ELLIS,

Defendant/Counterplaintiff-
Appellant/Cross-Appellee.

UNPUBLISHED
December 17, 2020

No. 349962
Ingham Circuit Court
LC No. 18-002415-DM

Before: RONAYNE KRAUSE, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce centered around an antenuptial agreement. On appeal, defendant argues that the trial court erred by declining to invade plaintiff’s separate assets, which were defined pursuant to the antenuptial agreement, and that the trial court’s award of attorney fees to plaintiff pursuant to the terms of the antenuptial agreement was also an abuse of discretion. Plaintiff cross-appeals and argues that the trial court’s decision to reduce the amount of attorney fees awarded from the amount he requested was an abuse of discretion because the omitted fees were within the scope of the fees authorized under the parties’ antenuptial agreement. For the reasons set forth in this opinion, we affirm the trial court’s decision regarding the invasion of assets but remand for an evidentiary hearing regarding attorney fees.

I. BACKGROUND

The parties were married on May 10, 2009. Three days earlier, on May 7, 2009, the parties executed an antenuptial agreement. A portion of the agreement stated: “[e]ach party shall during his or her lifetime keep and retain sole ownership, control and enjoyment of all property, real, personal, intangible or mixed, now owned or hereafter acquired by him or her, free and clear of any claims by the other party.” The agreement also provided as follows:

[Defendant] recognizes that [plaintiff] is a person of substantial means, is possessed of substantial assets and will likely be the successor to a substantial family business enterprise either through inheritance, gift, purchase or a

combination thereof. As such, it is foreseeable to [defendant] and envisioned by the parties that [plaintiff] will acquire substantially more separate assets during the marriage, that the separate assets will likely grow significantly more than [defendant's] and that said growth is not unforeseeable and will not constitute a change in circumstances requiring a Court to void this Agreement.

The antenuptial agreement also provided that if the marriage ended in divorce, neither party would ask for a property settlement that would include an award of any separate assets belonging to the other party. However, the agreement further stated that plaintiff would pay defendant an additional \$50,000 if the parties remained married “for at least one year, and up to their fifth anniversary”; \$100,000 if the parties remained married “after year five, and up to their 10th anniversary”; and \$200,000 if the parties remained married “for at least ten years, and up to their 15th anniversary.” Defendant was also to receive 25% of the equity in the marital home if the parties divorced after their fifth anniversary.

The antenuptial agreement contained the following section regarding alimony:

7.A.2. ALIMONY. This Agreement shall serve as a bar or estoppel from the consideration, by the Court, of either party’s separate assets, except for Earnings as identified in Section 6, as defined in this Agreement,^[1] in the awarding of alimony. [Plaintiff] and [defendant] agree that even though there may be a substantial difference between the respective party’s separate assets, said assets are to be precluded for purposes of determining alimony. Nothing in this provision is intended to in any way affect the rights of any minor children of the marriage to the support of both parties, as defined by Michigan law.

The following provision pertaining to the parties’ costs in the event of a dispute was included in the antenuptial agreement:

10.E. ENFORCEMENT COST AND EXPENSES: [Plaintiff] and [defendant] shall bear his or her respective costs and expenses incurred in connection with this Agreement including, but not limited to, the negotiation, preparation and consummation of it. Should either [plaintiff] or [defendant] retain counsel for the purpose of enforcing or preventing the breach of a provision of this Agreement, including but not limited to, by instituting any action or proceeding to enforce any provision of this Agreement for damages by reason that any alleged breach of any provision of this Agreement, or specific performance, or for a declaration of such party’s rights or obligations under this Agreement or for any other judicial remedy relating to it, then the prevailing party shall be entitled to be reimbursed by the losing party for all costs and expenses so incurred including, but

¹ Section 6 of the agreement essentially provided that each party’s income, accumulations, and earnings during the marriage would remain the separate property of the party to whom the income, accumulations, and earnings were attributable.

not limited to, reasonable attorney fees and costs for the services rendered to such prevailing party.

The antenuptial agreement also indicated that each party retained and consulted with independent counsel. Included as exhibits to the agreement, and incorporated by reference, were each party's respective financial disclosures; the antenuptial agreement stated that each party acknowledged being apprised of this information.

On August 3, 2018, plaintiff filed for divorce. Three children had been born during the marriage. As specifically pertinent to the issues raised on appeal, plaintiff alleged in his complaint for divorce that "separate property exists pursuant to an Antenuptial Agreement dated May 7, 2009."

Defendant responded with an answer and counterclaim for divorce in which she alleged that plaintiff earned "several million dollars a year" through his self-employment and various business interests, that defendant was a "stay-at-home mother with no income," and that defendant "need[ed] spousal support" and funds to pay for legal representation. With respect to the antenuptial agreement, defendant stated: "Neither admit nor deny whether separate property exists and leave [plaintiff] to his proofs. Deny there is antenuptial agreement dated May 7, 2009."

The parties eventually reached an agreement on the issues of custody, parenting time, child support, and spousal support. Of these issues, only the matter of spousal support order is relevant on appeal. The order provided that plaintiff would pay spousal support to defendant for four years in the amount of \$3,250 per month. The order further stated that "[t]he above spousal support provision is final, binding and nonmodifiable" and that "the above payments shall terminate upon the death of the payer, payee spouse or remarriage of payee, and otherwise both parties hereby waive any other statutory rights to petition the Court for modification of spousal support."

On March 4, 2019, defendant moved the trial court to set aside the antenuptial agreement. Defendant argued that the agreement was unconscionable, unfair and unreasonable. Additionally, defendant argued that she was "seeking an equitable division of property, including by way of invasion of property deemed by said Antenuptial Agreement to be Plaintiff-Father's." Defendant contended that despite the antenuptial agreement, the trial court could not be stripped of its equitable powers to invade a spouse's separate property based on either MCL 552.23(1) (economic need of other spouse) or MCL 552.401 (other's spouse's contribution to the acquisition, improvement, or accumulation of the separate property).

In response, plaintiff contested defendant's claim that the antenuptial agreement should be set aside and moved to enforce the antenuptial agreement.

The trial court issued a written order denying defendant's motion to set aside the antenuptial agreement and granting plaintiff's motion to enforce the antenuptial agreement. The trial court reasoned that defendant had failed to show (1) that the antenuptial agreement was the product of fraud, duress mistake, misrepresentation, or nondisclosure of material fact; (2) that the agreement was unconscionable when it was executed; or (3) that there had been changes in

circumstances “of the magnitude to make enforcement of the antenuptial agreement unfair and unreasonable.”²

Plaintiff subsequently moved for summary disposition under MCR 2.116(C)(10). As pertinent to the appellate arguments raised by the parties, plaintiff’s summary disposition motion requested that the trial court rule as a matter of law (1) that the express terms of the antenuptial agreement be enforced regarding property and attorney fees; (2) that there were no grounds to invade plaintiff’s separate property under MCL 552.23 or MCL 552.401; and (3) that, pursuant to the antenuptial agreement, plaintiff was entitled to attorney fees incurred in defending against defendant’s challenge to the validity of the antenuptial agreement because plaintiff was the prevailing party.

In response, defendant argued that the enforcement of the antenuptial agreement did not absolutely preclude invasion of plaintiff’s separate assets and that a court cannot enforce contractual terms that are against public policy. Relying on *Allard v Allard (On Remand)*, 318 Mich App 583; 899 NW2d 420 (2017), defendant argued that despite the existence of a valid antenuptial agreement, divorce proceedings were still equitable in nature and parties could not contractually prohibit a court from exercising its authority to do equity under MCL 552.23 and MCL 552.401.

Defendant argued that MCL 552.23 authorizes invasion of separate property as part of the property division. She asserted that there were genuine questions of fact regarding defendant’s need for invasion because her monthly budget was approximately \$10,000 and she would only receive \$3,250 per month in spousal support for four years. Defendant further contended that because MCL 552.23 authorized the trial court to consider the parties’ situations and ability to pay when deciding whether to award additional property or support, a disparity of assets was relevant to one spouse’s need for invasion under the statute and plaintiff’s retained assets following the divorce would be worth significantly more than what defendant would receive. Additionally, defendant maintained that there were questions of fact regarding her contribution to plaintiff’s separate assets for purposes of showing that invasion was justified under MCL 552.401 because she had managed the home and cared for the children while plaintiff worked in his family business. Defendant attached to her response a spreadsheet showing her alleged monthly budget of over \$10,000, which included \$1,000 for vacation and travel, approximately \$200 per month in charitable contributions, \$200 per month for Botox, and \$1,000 per month for clothes and shoes. According to defendant, plaintiff’s assets were worth over \$900,000 without including any value attributable to his business interests. Defendant provided no evidence of the value of plaintiff’s business interests.

Following a hearing at which the parties presented oral arguments consistent with their written submissions, the trial court granted plaintiff’s motion for summary disposition with respect to the above issues. The trial court ruled that the terms of the antenuptial agreement would be enforced as written such that the parties would be awarded their respective separate property as

² Defendant does not challenge this ruling on appeal.

defined by the agreement, although the trial court clarified that this ruling did not affect the spousal support order that had already been entered.

Additionally, the trial court ruled that “[t]here is no genuine issue of material fact and Defendant has not met her burden to show a legal basis for invasion of Plaintiff’s separate property as defined in the Antenuptial Agreement pursuant to MCL 552.23, MCL 552.401, nor due Plaintiff’s [sic] wealth/net worth.” At the hearing, in announcing its ruling, the trial court explained that it understood “that the defendant will not be living in the manner she was during the course of the marriage” but that “she has adequate support by terms of the prenuptial” and “[t]here is no need that the court is able to discern.” The trial court explicitly recognized that it retained its discretion under *Allard* to exercise its equitable powers to invade separate property based on necessity, but it declined to do so in this case. Regarding contribution, the trial court explained that defendant had not made any showing that she had contributed to the acquisition or increase of the assets, which the court distinguished from contributing to the marriage generally. Finally, the trial court ruled that under the antenuptial agreement, plaintiff was entitled to attorney fees incurred for enforcing and defending the antenuptial agreement. Plaintiff was ordered to submit a brief detailing his claimed attorney fees.

On June 14, 2019, plaintiff filed a brief in support of his request for attorney fees under the antenuptial agreement and claimed that he should be awarded \$42,088.23 in attorney fees incurred for defending the antenuptial agreement. Plaintiff attached a bill of costs for this amount. Plaintiff argued that he incurred legal expenses to declare his rights under the agreement since the beginning of the case because he pleaded the existence of the antenuptial agreement and defendant denied the existence of separate property, which affected the initial stages of discovery.

Additionally, plaintiff argued that he incurred substantial costs related to defendant’s motion to set aside the antenuptial agreement and plaintiff’s opposing motion to enforce the agreement, and plaintiff prevailed in that dispute. Plaintiff also argued that he incurred further costs and had to file a motion for summary disposition to defend against defendant’s attempts to invade his separate property contrary to the antenuptial agreement’s provision stating that defendant would not seek plaintiff’s separate property. Plaintiff prevailed on this motion as well. Plaintiff accordingly sought reimbursement for his attorney fees related to these matters. In calculating the amount requested, plaintiff estimated that 25% of his attorney fees incurred in discovery were attributable to defending the antenuptial agreement. Plaintiff also explained why the requested fees were reasonable under the factors enunciated in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982) and MRPC 1.5(a).

As relevant to this appeal, defendant argued in her trial brief that the attorney fees requested by plaintiff should be reduced by \$5,573.53, representing fees incurred between November 14, 2018, and March 4, 2019, because these fees were all incurred before defendant’s motion to set aside the antenuptial agreement and plaintiff’s motion to enforce the agreement. Defendant further argued that plaintiff’s requested attorney fees should be reduced for the period of March 5, 2019 to March 20, 2019, by \$7,489.13 to reflect the amount of the fees incurred during that period that was attributable to mediation, defendant’s motion to compel discovery, and other matters unrelated to the antenuptial agreement. Additionally, defendant argued that plaintiff’s requested attorney fees should be reduced for the period March 23, 2019 to May 3, 2019 by \$6,948.61 to account for fees that were actually incurred for complying with the court’s order to provide defendant with

meaningful discovery, attending mediation, and addressing defendant's request to adjourn the trial. Finally, defendant argued that plaintiff's requested attorney fees should be reduced for the period May 9, 2019 to June 13, 2019, by \$4,854 because that amount was actually incurred for complying with the order to provide meaningful discovery to defendant, attending mediation, attending the summary disposition hearing, and preparing the brief and bill of costs related to plaintiff's request for attorney fees. In total, defendant argued that plaintiff's requested attorney fees should be reduced by \$24,865.27.

In reply, plaintiff argued that the attorney fees incurred before defendant filed her motion to set aside the antenuptial agreement had already been reduced to reflect the fees actually attributable to defending the antenuptial agreement in light of defendant's challenge to the antenuptial agreement. Plaintiff also maintained that the attorney fees incurred from March 5, 2019 to June 13, 2019, to which defendant objected were also already limited to those incurred in relation to defending the antenuptial agreement. Plaintiff maintained that defendant refused to abide by the terms of the antenuptial agreement during the mediation process, which caused the mediation to last longer. Plaintiff argued that defendant's motion to compel discovery and motion to adjourn were also related to plaintiff's separate property and that these motions therefore caused plaintiff to incur attorney fees related to enforcing the antenuptial agreement.

The bench trial commenced on June 19, 2019. After brief testimony from plaintiff, the trial court found that the statutory proofs for divorce had been met. The proceedings subsequently continued to address the attorney fee issue. Plaintiff testified again and identified the bill of costs attached to the brief regarding attorney fees as the bill representing the enforcement of the antenuptial agreement. The bill of costs was admitted as an exhibit. Plaintiff also testified that he had agreed in his fee agreement to pay his attorney's hourly rate of \$340 and \$225 an hour for the work of an associate attorney at the firm. There was no further material testimony relative to the attorney fees. The trial court determined that the amount requested in attorney fees was reasonable and granted plaintiff's request for attorney fees "minus \$5,500 that the defendant claims was incurred before she made her motion challenging the antenuptial agreement." Accordingly, defendant was ordered to pay \$36,582 in attorney fees to plaintiff.

The judgment of divorce was entered on July 8, 2019. The judgment incorporated the March 20, 2019 orders regarding spousal support, child support, custody, and parenting time. According to this agreement, plaintiff would pay defendant \$3,250 per month in spousal support for four years. It was ordered that the marital home, which plaintiff owned before the marriage, would be sold and that defendant would receive 25% of the net proceeds from the sale in accordance with the terms of the antenuptial agreement. As previously noted, plaintiff was awarded \$36,582 in attorney fees regarding enforcement of the antenuptial agreement. Defendant was awarded \$200,000 pursuant to the terms of the antenuptial agreement, from which the attorney fees owed to plaintiff were to be deducted. This resulted in a net award of \$163,418 to defendant.

This appeal followed.

II. INVASION OF SEPARATE ASSETS

A. STANDARD OF REVIEW

A trial court's summary disposition ruling is reviewed de novo. *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005). MCR 2.116(C)(10) provides that summary disposition is warranted if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "The trial court must consider the submitted evidence in the light most favorable to the nonmoving party, but may not make findings of fact or weigh credibility in deciding the motion." *Reed*, 265 Mich App at 141.

The interpretation of a contract, such as an antenuptial agreement, presents a question of law that is also reviewed de novo. *Id.*

Finally, "[d]ivorce actions in Michigan are still considered a type of equity suit even though Michigan no longer has separate equity courts. In equity cases it is not enough for the trial court to have acted in a nonarbitrary manner; it must also reach a disposition that is fair and just." *Sparks v Sparks*, 440 Mich 141, 150; 485 NW2d 893 (1992) (citation omitted). Accordingly, in the summary disposition context where a trial court is prohibited from making findings of fact, *Reed*, 265 Mich App at 141, "the appellate court must decide whether the dispositive ruling was fair and equitable in light of [the undisputed] facts." *Sparks*, 440 Mich at 151-152. The *Sparks* Court clarified, however, that "because we recognize that the dispositional ruling is an exercise of discretion and that appellate courts are often reluctant to reverse such rulings, we hold that the ruling should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable." *Sparks*, 440 Mich at 152 (citations omitted). "[T]he appellate standard of review of dispositional rulings is not limited to clear error or to abuse of discretion." *Id.* at 151.

B. ANALYSIS

"[T]he trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets." *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (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." *Id.* at 494.

In this case, the parties defined their separate property in their antenuptial agreement. "[P]renuptial agreements governing the division of property in the event of a divorce are recognized in Michigan." *Reed*, 265 Mich App at 142; see also MCL 557.28 ("A contract relating to property made between persons in contemplation of marriage shall remain in full force after marriage takes place."). On appeal, defendant does not challenge the validity or enforceability of the parties' antenuptial agreement. Defendant also does not contest on appeal the trial court's interpretation or application of this language in the agreement, and defendant does not claim that plaintiff was awarded any property that was not actually his separate property as defined by the antenuptial agreement. Instead, defendant argues that the trial court erred by refusing to invade plaintiff's separate property. Defendant focuses generally on the disparity between the value of the separate property retained by plaintiff and the amount defendant received under the terms of the antenuptial agreement along with the separate spousal support agreement, as well as her contention that the amount she received was insufficient for her to maintain her previous standard of living. Defendant further argues that invasion of plaintiff's separate assets was justified under both MCL 552.23(1) and MCL 552.401.

A spouse's separate estate can be invaded for redistribution if one of two statutory exceptions, which are contained in MCL 552.23 and MCL 552.401, have been met. *Reeves*, 226 Mich App at 494.

MCL 552.23(1)³ provides as follows:

Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

This statutory provision has been interpreted to mean "that invasion is allowed when one party demonstrates additional need," such as when the property division otherwise "would have been insufficient for suitable support in the manner to which the [parties] were accustomed." *Reeves*, 226 Mich App at 494.

MCL 552.401 provides as follows:

The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property. The decree, upon becoming final, shall have the same force and effect as a quitclaim deed of the real estate, if any, or a bill of sale of the personal property, if any, given by the party's spouse to the party.

With respect to this statute, this Court has previously explained that "[w]hen one significantly assists in the acquisition or growth of a spouse's separate asset, the court may consider the contribution as having a distinct value deserving of compensation." *Reeves*, 226 Mich App at 495.

In *Allard*, 318 Mich App at 587, this Court held that "parties cannot, by antenuptial agreement, deprive a trial court of its equitable discretion under MCL 552.23(1) and MCL 552.401." The *Allard* Court recognized that this issue presented the "seeming intersection of two bedrock principles of Michigan jurisprudence: first, that the fundamental right to contract must be protected by allowing parties to contract freely and by enforcing contractual agreements; second, that courts sitting in equity must be free to afford whatever relief is necessary to see done that

³ The other subsections of this statute are not implicated by the facts of this case or the parties' arguments.

which, in good conscience, ought to be done.” *Allard*, 318 Mich App at 595-596 (citations omitted). However, the Court noted that “[t]he laws of divorce are statutory in nature and the equitable disposition of property is confined to the limits of the applicable statutes.” *Id.* at 596 (quotation marks and citation omitted; alteration in original). The Court further noted that “contracts founded on acts prohibited by a statute, or contracts in violation of public policy, are void.” *Id.* at 598 (quotation marks and citation omitted). Accordingly, the *Allard* Court explained its holding as follows:

In concert, MCL 552.12,^[4] MCL 552.23(1), and MCL 552.401 clearly demonstrate that the Legislature intends circuit courts, when ordering a property division in a divorce matter, to have equitable discretion to invade separate assets if doing so is necessary to achieve equity. These statutes do not afford the parties to a divorce any statutory right to *petition* for invasion of separate assets—at least none that is distinct from the parties’ right to petition for divorce in the first instance. Rather, the statutes simply empower the circuit court. For this reason, parties have no discernible rights to waive under MCL 552.23(1) and MCL 552.401. Moreover, to the extent that parties attempt, by contract, to bind the equitable authority granted to a circuit court under MCL 552.23(1) and MCL 552.401, any such agreement is necessarily void as against both statute and the public policy codified by our Legislature. Put differently, the parties to a divorce cannot, through antenuptial agreement, compel a court of equity to order a property settlement that is *inequitable*. Although parties have a fundamental right to contract as they see fit, they have no right to do so in direct contravention of this state’s laws and public policy. [*Allard*, 318 Mich App at 600-601 (citation omitted).]

From these statutes, defendant seemingly believes she is *entitled* to an invasion of plaintiff’s separate assets under MCL 552.23(1) or MCL 552.401. However, such an argument ignores that these statutes “simply empower the circuit court” and do not provide an absolute right to invade the other party’s separate property. *Allard*, 318 Mich App at 600-601. Moreover, when this same argument was raised in a different case, this Court explained the flaws in the argument in a published opinion:

Defendant misreads and mischaracterizes our *Allard* decision. He does not possess a statutory right to invade plaintiff’s separate property; rather, the trial court possesses the authority to do so if equity demands it. That is why the *Allard* Court held that parties cannot through a marital agreement *force* a trial court to order a property settlement that is *not equitable*. See *Allard*, 318 Mich App at 601. Our holding presupposed an inequitable agreement; otherwise, there would be no issue in dividing the property through that agreement’s terms. [*Skaates v Kayser*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 346487); slip op at 11.]

⁴ This statute provides in pertinent part that “Suits . . . for a divorce, shall be conducted in the same manner as other suits in courts of equity; and the court shall have the power to award issues, to decree costs, and to enforce its decrees, as in other cases.” MCL 552.12.

Moreover, the trial court in the instant case made clear that it understood that it retained its equitable powers under MCL 552.23 and MCL 552.401 and that the parties' antenuptial agreement did not waive the trial court's authority under these statutes. Defendant's argument seems to imply that the trial court was required to make the parties' property settlement more *equal* in order to avoid ordering an inequitable settlement. However, there is no requirement that a property division be "equal" or the product of "strict mathematical formulations." *Sparks*, 440 Mich at 159; see also *Reeves*, 226 Mich App at 497 ("[I]t does not matter if the division of the entire holdings appears one-sided, what is important is the division of the marital estate.").

On the record before us, this Court is not left with a firm conviction that the trial court's ruling was inequitable where the property division represented the parties' freely made agreement under which defendant still received significant assets. *Sparks*, 440 Mich at 151-152.

Turning to defendant's specific arguments under each statute, defendant argues that the trial court erred by not invading plaintiff's separate assets under MCL 552.23(1) because the trial court's equitable obligations included maintaining defendant's standard of living and the \$3,250 per month in spousal support awarded to defendant "did not come close to meeting the amount she actually spends per month." Defendant further argues that a substantial amount of her property settlement will be diminished by her own attorney fees and the portion of plaintiff's attorney fees that she was ordered to pay. Additionally, defendant emphasizes that plaintiff retained assets worth significantly more than what defendant was awarded and earned a substantial annual income, in contrast to defendant's lack of any income other than the spousal support awarded.

There appears to be no dispute regarding the amount defendant was entitled to receive under the terms of the antenuptial agreement.⁵ There also appears to be no dispute that the value of the separate property retained by plaintiff, and his income, substantially exceeded the value of the property defendant received under the terms of the antenuptial agreement and defendant's income. However, from these undisputed facts, the trial court determined that defendant had adequate support and that there was no discernable need justifying invasion of plaintiff's separate assets. Defendant has not provided any evidence or argument that she cannot live comfortably on the amount she received under the antenuptial agreement combined with her spousal support. Even accepting as true her claimed monthly budget and that this budget reflected her monthly spending before the divorce, defendant has not cited any binding authority for the proposition that having suitable support to live in the manner to which she was accustomed means continuing to have every luxury available after the divorce that was previously available. See *Charlton v Charlton*, 397 Mich 84, 99; 243 NW2d 261 (1976) ("In the tragic event of divorce involving children, it is rare that either party (or the children) can financially continue in the same lifestyle as when living together.").

Considering that the property settlement reflected an enforcement of the specific contractual agreement between these parties, that the parties also agreed to additional spousal

⁵ It seems that the only dispute in this regard, which is not an issue on appeal, was whether the marriage would be considered to have lasted more or less than 10 years and, accordingly, whether defendant was entitled to \$100,000 or \$200,000 based on the length of the marriage under the terms of the antenuptial agreement.

support to be awarded to defendant, that defendant's total award was not insubstantial, and that there is no evidence that defendant cannot live comfortably on the amount she received, we are not left with a firm conviction that the trial court's ruling declining to invade plaintiff's separate assets under MCL 552.23(1) was inequitable. *Sparks*, 440 Mich at 151-152.

Next, defendant argues that the trial court erred by not invading plaintiff's separate property under MCL 552.401 because defendant contributed to plaintiff's business by staying home to manage the household and care for the children, which allowed plaintiff to focus on building his family business. Defendant relies on *Hanaway v Hanaway*, 208 Mich App 278, 293; 527 NW2d 792 (1995), in which this Court stated as follows:

We are unable to agree with the court that plaintiff made no contribution to the company's assets or appreciation. The trial testimony indicates that plaintiff administered the household physically and financially and cared for the children until late in the marriage, while defendant, the company president, devoted himself to the business, working long work weeks. The business clearly prospered during the marriage. While the source of defendant's interest in the company was his father's annual gifts of stock, the financial yield over time from that interest and the increased value of that interest necessarily reflected defendant's investment of time and effort in maintaining and increasing the business, an investment that was facilitated by plaintiff's long-term commitment to remain at home to run the household and care for the children.

In this case, even accepting defendant's contention that she made it possible for plaintiff to focus on his work in the family business by staying home to manage the household and care for the children, defendant has not presented any evidence that the value of plaintiff's business grew as a result. Defendant did not present any evidence to show the current value of plaintiff's business or historical values showing an increase in the business's value. Accordingly, the factual record present in this case is distinguishable from that in *Hanaway*. See *id.* at 283, 285-286, 293. Thus, in the absence of evidence from which the trial court could have concluded that there was an increase in value to the business, this Court is not left with a firm conviction that the trial court's ruling declining to invade plaintiff's separate assets under MCL 552.401 was inequitable. *Sparks*, 440 Mich at 151-152.

Accordingly, we affirm the trial court's ruling regarding the invasion of plaintiff's separate assets.

III. ATTORNEY FEES

A. STANDARD OF REVIEW

"In a divorce action, this Court reviews for an abuse of discretion an award of attorney fees." *Skaates*, ___ Mich App at ___; slip op at 11. "[A]n abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011). "Any findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error, but questions of law are reviewed de novo." *Reed*, 265 Mich App at 164 (citations omitted).

B. ANALYSIS

In Michigan, “ ‘attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract.’ ” *Skaates*, ___ Mich App at ___; slip op at 11, quoting *Reed*, 265 Mich App at 164. In this case, the attorney fees at issue are based on the parties’ contractual agreement in their antenuptial agreement that provided in pertinent part as follows:

ENFORCEMENT COST AND EXPENSES: [Plaintiff] and [defendant] shall bear his or her respective costs and expenses incurred in connection with this Agreement including, but not limited to, the negotiation, preparation and consummation of it. Should either [plaintiff] or [defendant] retain counsel for the purpose of enforcing or preventing the breach of a provision of this Agreement, including but not limited to, by instituting any action or proceeding to enforce any provision of this Agreement for damages by reason that any alleged breach of any provision of this Agreement, or specific performance, or for a declaration of such party’s rights or obligations under this Agreement or for any other judicial remedy relating to it, then the prevailing party shall be entitled to be reimbursed by the losing party for all costs and expenses so incurred including, but not limited to, reasonable attorney fees and costs for the services rendered to such prevailing party.

By the time of trial, the only attorney fees at issue were those that plaintiff requested with respect to enforcing the antenuptial agreement on the ground that the agreement authorized reimbursement for such fees to the prevailing party. These are also the only attorney fees at issue on appeal. As set forth above, the only material evidence in support of plaintiff’s request for attorney fees was the billing statement and plaintiff’s cursory testimony identifying the billing statement as such. The billing statement reflected that certain bills had been reduced to 25% of their original value to reflect the portion allegedly attributable to enforcing the antenuptial agreement. Defendant essentially argued that certain portions of the billed attorney fees were not attributable to enforcing the antenuptial agreement but were instead attributable to other matters involved in the divorce proceedings for which plaintiff was not entitled to recoup attorney fees. Thus, the only real dispute with respect to these claimed attorney fees was whether the amount requested by plaintiff was entirely attributable to enforcing the antenuptial agreement.

The entirety of the trial court’s factual findings in granting an award of attorney fees were as follows:

Regarding the attorney fees, they were properly plead before the court. The Wood factors or Pirgu factors were properly plead. The—the amount is reasonable, so I am going to grant the amount requested, minus \$5,500 that the defendant claims was incurred before she made her motion challenging the prenuptial agreement. So that bring the total to \$36,582.

On appeal, defendant again essentially argues that plaintiff claimed a right to attorney fees that were not actually incurred for enforcing the antenuptial agreement but instead were related to other matters in the divorce. Plaintiff, in his cross-appeal, maintains that the trial court erred by denying his request for attorney fees incurred before defendant formally moved to set aside the

antenuptial agreement because, according to plaintiff, the fees that were incurred before that motion and for which he sought reimbursement were related to discovery stemming from defendant's denial of the antenuptial agreement's existence and therefore were still aimed at enforcing the antenuptial agreement.

However, the trial court's findings of fact are insufficient for this Court to adjudicate this matter because the trial court did not make any findings that resolved the actual dispute between the parties, i.e., whether the attorney fees claimed by plaintiff actually related to enforcing the antenuptial agreement or other matters in the divorce that were simultaneously pending. In merely distinguishing the claimed fees based on whether they were incurred before or after the date of defendant's motion to set aside the antenuptial agreement, the trial court misunderstood the nature of the parties' dispute: defendant claimed that certain claimed fees incurred after the motion to set aside the antenuptial agreement did not actually relate to enforcing the agreement, and plaintiff claimed that he only sought reimbursement for fees incurred before that motion that nonetheless pertained to the enforcement of the antenuptial agreement. Because the trial court's findings of fact regarding the attorney fee issue were inadequate to facilitate this Court's appellate review of the issue, we must remand this matter to permit the trial court to make the necessary findings of fact. *Woodington v Shokoohi*, 288 Mich App 352, 371-372; 792 NW2d 63 (2010); *Augustine*, 292 Mich App at 432-433.

Moreover, although the award of attorney fees in this case was based on the contractual provision in the parties' antenuptial agreement and contractual agreements entitling a prevailing party to recoup attorney fees are judicially enforceable, *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996), recovery under such provisions is still "limited to reasonable attorney fees," *id.* at 195-196. Indeed, the parties' antenuptial agreement in this case is in accordance with this principle since it authorizes "reasonable attorney fees."

Considering that defendant challenged the propriety of plaintiff's claimed attorney fees in the trial court, the trial court should have "inquire[d] into the services actually rendered before approving the bill of costs." *Cassidy v Cassidy*, 318 Mich App 463, 488; 899 NW2d 65 (2017) (quotation marks and citation omitted). In doing so, the trial court should have applied the framework set forth in *Smith v Khouri*, 481 Mich. 519, 529; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.). *Cassidy*, 318 Mich App at 488. Although the trial court seemingly was aware of these factors, it failed to make any express findings on any of these factors other than simply stating that the fees were reasonable. A trial court should create a record of its rationale for its decision regarding attorney fees in order to facilitate appellate review. *Id.* at 489, citing *Smith*, 519 Mich at 530-532 (opinion by TAYLOR, C.J.). Admittedly, "there is no error in failing to conduct an evidentiary hearing if the parties created a sufficient record to review the issue, and the court fully explained the reasons for its decision." *Cassidy*, 318 Mich App at 488 (quotation marks and citation omitted). However, as previously discussed, the evidentiary record in this case is insufficient to permit adequate appellate review of the attorney fee issue and the trial court did not fully explain its rationale for its decision. Therefore, we remand this matter for purposes of an evidentiary hearing on the issue of attorney fees.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Neither party having prevailed in full, no costs are awarded. MCR 7.219.

/s/ Amy Ronayne Krause
/s/ Jane E. Markey
/s/ Stephen L. Borrello