

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN MARIE ENGERMAN,

Plaintiff-Appellee,

v

MATTHEW J. ENGERMAN,

Defendant-Appellant.

UNPUBLISHED

August 30, 2011

No. 295687

Kent Circuit Court

LC No. 06-010434-DM

AFTER SECOND REMAND

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

PER CURIAM.

We remanded this divorce case, for a second time, to allow the Kent Circuit Court to correct certain mathematical and valuation errors underlying its property division award and to elucidate why the division is equitable. *Engerman v Engerman*, unpublished opinion per curiam of the Court of Appeals, issued July 6, 2011 (Docket No. 295687) (*Engerman II*).¹ We retained jurisdiction as a matter of judicial expediency given the long procedural history of this case. On second remand, the circuit court corrected its mathematical and valuation errors as instructed by this Court. The circuit court further explained its method of equitably dividing the marital assets. We now affirm the circuit court's division of property and award of attorney fees.

¹ This case originally came before this Court in 2009, when defendant challenged the circuit court's division of the marital property and the award of spousal support and attorney fees to plaintiff. This Court remanded to the circuit court to make specific findings of fact regarding the value of the financial assets encompassed in the property division, to explain how it reached the numerical values, and to indicate whether it adjusted those values for taxes. *Engerman v Engerman*, unpublished opinion per curiam of the Court of Appeals, issued February 12, 2009 (Docket No. 281292) (*Engerman I*). On first remand, however, the circuit court made various errors in valuing the property as noted in *Engerman II*.

I. PROCEEDINGS ON SECOND REMAND

This Court briefly outlined the pertinent history and facts of this case in *Engerman I* and *Engerman II* and we need not reiterate that information. At issue on second remand was the correct value of the stock options earned by defendant while employed at Wolverine Worldwide and the severance package he received when leaving Wolverine's employment. Following our July 6 second remand to the circuit court, that court conducted an in-chambers conference with the parties to reach stipulations of fact regarding the valuation of the parties' assets. The court subsequently placed those stipulations on the record on July 20, 2011.

At the July 20 hearing, the parties continued to contest the correct method to calculate the tax penalties applicable to the stock options and severance package awarded to defendant. The parties stipulated that the Michigan income tax rate was 3.9-percent in the year that defendant liquidated these assets. Plaintiff, however, did not agree that defendant's assets could be valued by simply subtracting the straight percentage of federal or state taxes paid from the gross value of the assets. Rather, plaintiff argued that the valuation is much more complicated, including capital gain valuations and various credits. The circuit court queried whether plaintiff was "willing to proceed in the analysis to get this thing resolved" using the 3.9-percent state tax rate and plaintiff agreed on the record. The parties then stipulated to using the federal tax figures calculated by plaintiff's expert witness, Dennis DeKok.

Even with the stipulations entered by the parties, the circuit court experienced some difficulty in reaching correct mathematical values for the parties' financial assets. However, we are satisfied that the court ultimately reached the correct resolution. The court awarded defendant the after-tax, net value of the severance package and stock options. The court accepted DeKok's gross valuation of these assets at \$285,371.18 and \$30,416 respectively for an aggregate total of \$315,787.18. The court also accepted DeKok's calculation of the federal tax liability on these assets of \$96,756, reducing the value to \$219,031.18. The court then calculated the 3.9-percent state tax at \$8,542.22, leaving a total net value of \$210,488.96. These figures are supported by the record evidence and this Court's independent calculations. The court also awarded defendant a vehicle with a "Blue Book" value of \$23,700.

The court awarded plaintiff the pre-tax value of various financial accounts, including IRAs and 401(k)s, at the stipulated value of \$415,931. The court awarded plaintiff a vehicle with a "Blue Book" value of \$30,460. The court also continued to award plaintiff spousal support of \$5,000 a month for 12 years, for a total of \$720,000, and \$38,000 of her accumulated \$71,000 in attorney fees.

The court equally divided the parties' joint retirement account and their equity in the marital home. The court did not require plaintiff to sell the residence at that time, but noted that should defendant insist on selling the home in order to divide the equity, defendant would have to accept his share of the loss on the proceeds.

Ultimately, the circuit court determined that it could not accurately consider the equity of the property division as a percentile ratio. Specifically, the court reasoned that "[i]t would not be proper to compare" the divided assets as a percentile ratio because plaintiff was awarded financial assets on a gross basis while defendant was awarded financial assets on a net basis.

Instead, the court addressed the equity issue by considering the value of assets awarded to the parties in addition to the parties' projected earned incomes over the next 17 years, when the parties would have access to the equally divided joint retirement account.

Defendant currently earns \$200,000 each year, but has the potential to earn up to \$270,000. The court gave defendant the advantage and calculated his total earned income for the next 17 years based on his current salary. That figure amounted to \$3.4 million. The court added the value of the \$23,700 automobile and the after-tax value of \$210,488 for the financial assets. The court also subtracted the total \$720,000 defendant would pay in spousal support and \$38,000 he would pay in attorney fees to plaintiff. The court then determined that defendant would have approximately \$2.8 million in assets and income over the next 17 years. Our calculations arrive at an exact figure of \$2,876,188.

The court determined that plaintiff had reached her maximum earning potential at \$57,000 a year, for a total of \$969,000 over a 17-year period. Adding the \$720,000 she would receive in spousal support, the \$38,000 she would receive in attorney fees, the \$451,931 in financial assets,² as well as her \$38,000 share of the equity in the marital home and \$30,460 vehicle, plaintiff's total income and assets amounted to \$2,247,391.

While the circuit court had previously stated its intent to divide the marital assets in plaintiff's favor, the court concluded that *defendant* was actually given the financial advantage under its calculation method based on his greater future income. Even so, the court believed the division was equitable because it protected both parties' standards of living until retirement.

II. VALUATION OF MARITAL ASSETS

As noted in *Engerman II*, slip op at 3, quoting *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003), "a trial court must first make specific findings regarding the value of property" before attempting to divide those assets. These valuations are findings of fact that we review for clear error. *Lesko v Lesko*, 184 Mich App 395, 403 n 3; 457 NW2d 695 (1990). Disputed in this case is the value of defendant's stock options and severance package. The circuit court originally valued these assets on a pre-tax basis even though defendant had already liquidated the property and paid state and federal taxes on the proceeds. We therefore remanded to the circuit court to revalue the stock options and severance package "on an after-tax net basis." *Engerman II*, slip op at 3. The court also originally erred in adopting, from plaintiff's trial brief, an incorrect gross valuation of these assets. We instructed the circuit court to correctly value these assets based on the record evidence. *Id.*

² There is no way to accurately gauge the tax penalties plaintiff will face when she liquidates these financial assets in the future. As a result, plaintiff's wealth over the next 17 years will necessarily be lower than the circuit court's current calculation of plaintiff's projected income and assets. Despite his continued protestations regarding the inequities of the circuit court's decision, defendant reaps the benefits of this financial uncertainty, not plaintiff.

On second remand, the circuit court followed these instructions. The parties stipulated that DeKok accurately calculated the federal tax paid on these assets. DeKok did not calculate defendant's state tax liability and defendant ignored our advice to submit his state income tax documents to the circuit court. However, the parties agree that the rate of state income taxation would have been 3.9-percent. Although plaintiff contends that she consulted with a financial advisor who stated that defendant's tax liability would have been reduced by various credits, plaintiff failed to provide an affidavit from the financial advisor and has not requested additional time for discovery on this issue. The circuit court used the stipulated figure to calculate the state income tax and reduced the value of the stock options and severance package accordingly.

Moreover, the court carefully considered the documentation provided by DeKok in ascertaining the correct gross values for each financial asset. The court then aggregated these values to reach an accurate total gross value that was consistent with the figure reached by DeKok. Accordingly, we find no remaining error in the court's valuation of the stock options and severance package awarded to defendant.

II. EQUITY OF THE PROPERTY DIVISION

As noted in *Engerman II*, slip op at 2, quoting *Draggoo v Draggoo*, 223 Mich App 415, 429-430; 671 NW2d 64 (2003), the circuit court's dispositional order dividing the marital assets is discretionary "and should be affirmed unless this Court is left with the firm conviction that the division was inequitable." Yet, equity does not require numerical equality. *Washington v Washington*, 283 Mich App 667, 673; 770 NW2d 908 (2009). When a court divides the parties' assets unequally, it must provide "an adequate explanation for the chosen distribution." *Id.*

As we explained in *Engerman II*, slip at 2-3:

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).

In *Engerman II*, slip op at 4, we did not, in general, question the circuit court's grounds to support what appeared to be an unequal division of property in plaintiff's favor:

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. 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*.

We were concerned, however, that the circuit court may have placed too much emphasis on defendant's fault in causing the breakdown of the marriage. *Engerman II*, slip op at 4. It is well established that a court's division of marital property may not be effectuated to punish a party. *Berger v Berger*, 277 Mich App 700, 722; 747 NW2d 336 (2008). On second remand, the circuit court dealt with the issue of fault appropriately. The court continued to note defendant's fault, but based the equitable division of the property on equalizing the parties' standards of living between now and retirement. Accordingly, we are no longer concerned that the circuit court abused its discretion in considering the factors relevant to reaching an equitable property division. Even though the court has now determined that defendant will have greater assets and income than plaintiff in the future, the court carefully weighed the *Sparks* factors and reached an equitable division to meet plaintiff's financial needs.

We note that, generally, a trial court expresses the ratio of property division in percentages. As already noted, the circuit court in this case declined to compare defendant's post-tax property values to plaintiff's pre-tax property values as a percentile ratio. Instead, the court addressed the equity issue by considering the value of the various assets awarded to the parties in addition to the parties' projected earned incomes until retirement. Defendant will possess \$2,876,188 in assets and income, while plaintiff will possess \$2,247,391 in assets and income over that period. On average, defendant will have access to \$169,187 in assets and income annually, while plaintiff will have access to \$132,199. These figures seem more than adequate for the parties' to each maintain a comfortable standard of living, especially as their children are now grown. Accordingly, we find no abuse of discretion in the circuit court's division.

III. ATTORNEY FEES

Defendant also challenges the court's award of attorney fees to plaintiff. Specifically, defendant contends that plaintiff should be required to liquidate the financial assets she was awarded in the property settlement to meet her legal obligations. However, defendant has never challenged the reasonableness or the amount of plaintiff's attorney fees.

As we noted in *Engerman II*, slip op at 5-6:

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 v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010)]. "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.*

* * *

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 [following *Engerman I*], 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.*

In *Engerman II*, slip op at 6-7, we distinguished *Kurz* given our perception of the inequity in the property division. The circuit court has now adequately supported the equitability of its decision and we are no longer concerned about the equity of the attorney fee award.

Affirmed.

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