

STATE OF MICHIGAN
COURT OF APPEALS

SHIRLEY ANN HOSTED,

Plaintiff-Appellee,

v

DONALD DENNIS HOSTED,

Defendant-Appellant.

UNPUBLISHED

December 20, 2011

No. 299116

Ogemaw Circuit Court

LC No. 09-657223-DO

Before: CAVANAGH, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant appeals as of right from the judgment of divorce. We affirm in part, vacate in part, and remand for further proceedings.

The parties were married in March of 1974. Plaintiff had four children from a previous marriage; the parties had two children together. Both plaintiff and defendant had high school educations; plaintiff quit working after she married defendant to stay home and raise the children. Plaintiff suffered from diabetes, and defendant suffered from arthritis and back pain.

In 2004, defendant started Hosted Construction and operated it out of buildings on the marital property. Plaintiff helped in the business by typing contracts and designing houses. In 2008, Hosted Construction contracted to build Matthew Waack's house. While on that job defendant met William and Carol Waack, Matthew's parents. The Waacks hired defendant to do work on their house, and defendant and the Waacks became close friends. Plaintiff was not happy with the situation, and believed that defendant and Mrs. Waack were having an affair.

Defendant, Mrs. Waack, and Mr. Waack all denied that anything inappropriate occurred between defendant and Mrs. Waack. However, defendant and the Waacks had lunch together five to six times a week; plaintiff never attended these lunches. Mrs. Waack was seen giving defendant back rubs and being overly friendly and flirtatious with defendant. Defendant knew plaintiff was unhappy with his relationship with the Waacks, but continued it. Plaintiff and Mrs. Waack had a physical confrontation at defendant's business, and defendant told plaintiff to leave and get a divorce.

Plaintiff filed suit for divorce. At the time of trial plaintiff was 67 years old and defendant was 60 years old. The trial court entered a temporary support order requiring defendant to provide plaintiff with a credit card for necessities, to pay plaintiff \$400.00 per

month in temporary spousal support, and to pay all expenses and household bills. However, defendant cancelled the credit card because he felt that plaintiff was abusing it. Thereafter, plaintiff used a Chase credit card for necessities.

The parties stipulated to the appraisal of the real property. Plaintiff testified that defendant prevented the appraisal of some rooms in the outbuildings on the marital property. Defendant denied that he did anything inappropriate, and maintained that the appraiser simply missed the rooms.

The trial court awarded plaintiff the real property, some personal property, and spousal support. The trial court awarded defendant any interest he might have had in a boat and a camper, but found that defendant had attempted to hide the boat and camper, and so credited defendant's portion of the property \$5,500.00 for the boat and \$6,000.00 for the camper. The trial court awarded defendant his gun collection, but found that defendant had attempted to hide 60 guns. The trial court valued 30 guns at \$250.00 each and the remaining 30 guns at \$500.00 each.

The trial court ordered that defendant pay plaintiff permanent spousal support in the amount of \$2,061.00 per month, and one-half of the Chase credit card balance. The trial court found that defendant had not been honest about his income, observing that defendant's business records were disorganized and that defendant's lifestyle could not be supported by his reported income. The trial court imputed income of \$61,280.00 to defendant. The trial court also discovered that defendant received Social Security Disability benefits of \$1,275.00 per month, which the trial court said affirmed defendant's ability to pay spousal support.

On appeal, defendant first argues that the trial court's division of the marital property was inequitable. We disagree.

We review the trial court's findings of fact regarding division of property for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding of fact is clearly erroneous if, after a review of the entire record, we are left with the firm conviction a mistake was made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). If the findings of fact are not clearly erroneous, we evaluate the award to determine if it was fair and equitable in light of the facts. *Sparks*, 440 Mich at 151-152. We will affirm the trial court's ruling unless we are convinced that the division was inequitable. *Id.*

Marital property should be divided equitably in the light of all the circumstances. *Berger v Berger*, 277 Mich App 700, 716-717; 747 NW2d 336 (2008). The division need not be mathematically equal, but any significant departure from an equal division must be explained clearly. *Id.* at 717. To reach an equitable division, the trial court should consider the following factors:

- (1) the duration of the marriage, (2) the contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life situation of the parties, (6) the necessities and circumstances of the parties, (7) the parties' earning abilities, (8) the parties' past relations and conduct, and (9) general principles of equity. [*Id.*; see also *Sparks*, 440 Mich at 159-160.]

The trial court may properly consider fault as a factor in deciding the property division. *McDougal v McDougal*, 451 Mich 80, 88; 545 NW2d 357 (1996). However, the determination of relevant factors varies from case to case, and no one factor should be given undue weight. *Sparks*, 440 Mich at 159. The trial court may not assign disproportionate weight to any particular fact or circumstance. *Berger*, 277 Mich App at 717. Fault should not be used as a punitive reason for an inequitable division of property. *McDougal*, 451 Mich at 90.

The trial court indicated that the property division was 57/43 in favor of plaintiff. The parties disagree but we review the trial court's findings. *Sparks*, 440 Mich at 151.

Defendant argues that the trial court failed to make specific factual findings on the relevant factors. This argument is without merit.

The trial court's original opinion cited the appropriate factors from *Sparks*, but did not relate any specific findings to any particular factor. However, the trial court clarified its findings during the hearing on defendant's motion for amendment of or relief from judgment and order. At that hearing, the trial court identified the factors from *Sparks* and then made specific findings with respect to each relevant factor. The trial court indicated how it calculated the property division:

At this time, as to the distribution, I guess I'll just indicate the court's calculations.

The guns, I believe were given away to hide, along with the safe, to the son. I know he received 30 some guns. There was testimony there was up to 60 guns . . . Obviously, there was value

The personal property he was awarded \$103--\$103,185. The boat had a value of \$5500. I believe that was transferred to hide also. I believe the camper also had a value. I believe that was \$6000, and I believe that that was another hidden asset of Mr. Hosted. . . .

The un-appraised property also had a value that Mr. Hosted had control over, and all of that together, I believe makes up the difference in the award to Mr. Hosted. Which Mrs. Hosted's award, with her personal property, appears to be \$171,758.13.

I put values on the guns of, 30 of them at \$250 apiece and 30 at \$500. And that his award was \$131, 685--

A property division need not be mathematically equal, but any significant departure from an equal division must be explained clearly. *Berger*, 277 Mich App at 716-717. The trial court acknowledged that the division was 57/43, but stated that the deviation was justified based on plaintiff's inability to produce income and defendant's hiding of assets.

Next, defendant argues that the trial court's valuation of the guns was improper and that no evidence supported a finding that defendant had hidden assets. We disagree.

The trial court is obligated to establish the value of disputed pieces of marital property awarded to each party. *Woodington v Shokoohi*, 288 Mich App 352, 364; 792 NW2d 63 (2010). The trial court must determine a value even if neither party provides persuasive evidence regarding the asset's value. *Olson v Olson*, 256 Mich App 619, 628; 671 NW2d 64 (2003). If the trial court's value of any asset is within the range established by the evidence then there is no clear error. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

Testimony established that defendant gave away between 30 to 100 guns and at least one gun safe. The trial court's finding that 60 guns were given away was well within the range established by the evidence. There was also testimony that the average gun was worth more than \$250.00. The trial court's finding that 30 guns were worth \$250.00 and that 30 guns were worth \$500.00 was also within the range established by the evidence. The trial court's determination of the value of the guns was not clearly erroneous; neither was its determination that defendant had hidden assets.

We give special deference to the trial court's decision when its findings are based on the credibility of a witness. *Johnson v Johnson*, 276 Mich App 1, 11; 739 NW2d 877 (2007); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). The testimony in this case differed, and the trial court was required to determine which witnesses were credible. The testimony supported the trial court's finding that defendant had hidden assets.

The trial court's findings of fact were not clearly erroneous and the testimony supported the trial court's opinion. The property division was close to an even split, and the trial court explained and supported the deviation. The division was not inequitable based on the trial court's findings and reasoning.

Next, defendant argues that the trial court failed to make specific findings of fact to support the award of spousal support. We agree, vacate the award, and remand for further consideration of this issue.

We review the trial court's factual findings supporting a spousal support award for clear error. *Beason*, 435 Mich at 805. If the findings of fact are not clearly erroneous, we will evaluate the award to determine if it was fair and equitable in light of the facts, or was an abuse of discretion. *Sparks*, 440 Mich at 151-152; *Woodington*, 288 Mich App at 355. An abuse of discretion occurs when the trial court's decision is outside a range of reasonable and principled results. *Woodington*, 288 Mich App at 355.

The trial court has discretion in awarding spousal support and its decision must be affirmed unless we find the award inequitable. *Sparks*, 440 Mich at 151-152; *Berger*, 277 Mich App at 726. The purpose of spousal support is to balance the income and needs of the parties, while not impoverishing either party. *Berger*, 277 Mich App at 726. To be just and reasonable, the award should be based on the facts and circumstances of the case. *Id.* The trial court should consider the following factors:

- (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. [*Id.* at 726-727, quoting *Olson*, 256 Mich App at 631.]

The trial court must make specific factual findings regarding the factors relevant to its decision. *Myland v Myland*, 290 Mich App 691, 695; 804 NW2d 124 (2010).

The trial court's opinion laid out a statement of facts and factors to be considered when awarding spousal support, but failed to link the facts to the individual factors. The trial court simply stated that it had considered the factors and based on the record found that an award of spousal support was appropriate.

At the hearing on defendant's motion for amendment of or relief from judgment and order the trial court addressed the award of spousal support. The trial court did not specifically address the spousal support factors or put its reasoning on the record, and instead focused on why imputing income to defendant was proper. The trial court also briefly discussed defendant's ability to pay spousal support and indicated that with the addition of his Social Security, defendant's ability to pay was confirmed.

When considering the factors for spousal support, the trial court must make specific factual findings regarding the relevant factors. *Myland*, 290 Mich App at 695. The trial court failed to make specific findings of fact for the relevant factors regarding spousal support either in its opinion or during the hearing on defendant's motion. Therefore, we vacate the spousal support award and remand this matter to the trial court with instructions that the trial court reconsider the issue of spousal support and place its findings and conclusions on the record.

Finally, defendant argues that the case should be assigned to a different judge because the trial court is incapable of ruling fairly. We disagree.

We need not review issues raised for the first time on appeal. *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010). Defendant failed to move to have the trial court recuse itself. We are not required to review this issue because defendant did not raise this issue with the trial court first. *Id.* However, we may remand a case for assignment to a new trial judge to preserve the appearance of justice if the original judge would be incapable of discarding previously expressed views or findings. *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004).

The trial court set out specific facts and reasoning to support the property division. The trial court indicated that although it found defendant at fault, it was not giving extra emphasis to that fault. The record does not support defendant's assertion that the trial court's decision was based on personal opinion or any bias. Defendant has failed to indicate that the trial court is incapable of discarding previously expressed views or findings for future rulings.

We affirm the property division, vacate the award of spousal support, and remand this matter to the trial court for reconsideration of the issue of spousal support in accordance with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ Mark J. Cavanagh

/s/ David H. Sawyer

/s/ Patrick M. Meter