

STATE OF MICHIGAN
COURT OF APPEALS

MARGARET M. NOFZ,

UNPUBLISHED
April 19, 1996

Plaintiff-Appellee/Cross-Appellant,

v

No. 172647
LC No. 92-434721-DM

CRAIG E. NOFZ,

Defendant-Appellant/Cross-Appellee,.

Before: Fitzgerald, P.J., and Corrigan and C.C. Schmucker,* JJ.

PER CURIAM.

Defendant, Craig E. Nofz, appeals as of right from a January 26, 1994, judgment of divorce, challenging the trial court's division of the marital estate. Plaintiff cross-appeals, challenging the trial court's refusal to award alimony and attorney fees. We affirm.

The parties were married on October 30, 1989. On December, 20, 1989, their daughter, Chelsea, was born.¹ Before the marriage, plaintiff acquired a house in Ferndale. Mortgage payments, including tax and insurance, were \$389 per month. Plaintiff owned a 1981 Plymouth automobile that was not in safe operable condition. Defendant owned a 1984 Corvette free of debt. Defendant also had an account with Merrill Lynch that had a balance of \$27,800. From this account, defendant purchased 300 shares of General Motors stock at \$25 each for a total of \$7,500. Defendant also had a joint savings account with his father at Standard Federal Bank with a balance of \$10,500.58. Just before the marriage, defendant purchased a 1990 Chevrolet Lumina with a \$6,000 down payment and financed the remaining \$6,500 over forty-eight months, with the last payment scheduled date to be made in August 1993.

Plaintiff was employed before the marriage, but ceased to hold permanent employment since the marriage. Plaintiff was pregnant at the time the parties married and, according to plaintiff, the marriage

* Circuit judge, sitting on the Court of Appeals by assignment.

was conditioned upon defendant's consent that she would not work outside the home until Chelsea entered school. Defendant was employed at A.G. Davis until his layoff in December 1991. He was hired in June 1992 by Acutech Industries, earning a gross weekly wage of \$588.92.

The referee determined that the breakdown in the parties' marriage stemmed from each party accusing the other of engaging in an extramarital affair. Another issue that led to the marital breakdown was plaintiff's complaint that defendant refused to spend money for food, clothing, and medical care for the family.

With respect to the marital property, the referee found that the parties opened a joint savings account on November 17, 1989, by depositing \$2,158 in the account. This account was closed by defendant on November 26, 1991, by transferring the \$10,139.30 balance to a new joint money market account at Standard Federal. In February 1992, the \$9,972.41 balance of the money market account was withdrawn by defendant and a joint account was opened at Sterling Savings Bank with an initial deposit of \$7,492.82. In March 1992, a second money market account was opened at Standard Federal with an initial deposit of \$3,000. As of June 1, 1992, the Sterling Bank account contained \$7,552.12, the Standard Federal money market account contained \$2,798.38, and the Merrill Lynch account was valued at \$43,366.91, including the 300 GM shares. Plaintiff closed the Standard Federal account on June 1, 1992, by withdrawing the full balance. The Sterling account was closed by defendant on June 1, 1992, when he withdraw the full balance.

The referee determined that the value of the marital assets totaled \$33,409.03, which included the \$15,566.91 increase in value of the Merrill Lynch account, the \$7,552.12 that defendant withdrew from the Sterling account, and \$2,790 plaintiff withdrew from the Standard Federal account, and the \$7,500 market value of the 1990 Lumina. The referee concluded that fault was not established with enough consequence to allow favoring one party over the other. The referee recommended that the parties each receive equal shares of the marital assets subject to defendant's obligation to pay outstanding medical expenses of \$6,051.01. The referee further recommended that plaintiff receive the Lumina because plaintiff's 1981 vehicle was in disrepair and she and Chelsea were entitled to safe and reliable transportation. Both parties filed objections to the referee's recommendations with the trial court. After reviewing the evidentiary record, the referee's recommendations, and oral argument by counsel, the trial court found the referee's recommendation to be fair and equitable and adopted the recommendation in its entirety.

On appeal, defendant contends that the trial court's division of the marital estate was not fair and equitable given the short duration of the marriage. *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995), lv pending. Specifically, defendant first contends that the trial court erred by failing to award either party the assets that each owned separately before the marriage. Contrary to defendant's suggestion, however, the trial court made specific findings of fact regarding the property that should be treated as separate assets of the parties rather than marital assets. The trial court adopted the referee's recommendation, which noted that "each party owned certain assets at the time of the

marriage, which are not considered to be part of the marital estate.” The referee found that the Ferndale residence and the 1981 Plymouth Champ were separate properties of plaintiff, and that the 1984 Corvette and the \$27,800 balance of the Merrill Lynch account at the time of the marriage were defendant’s separate property. Thus, defendant’s argument is without merit.

Defendant also contends that the cash payment to plaintiff should have been offset by the amount of the mortgage, taxes, and insurance that he paid on the Ferndale residence and by the amount of the repairs made to the home during the marriage. We disagree. Although plaintiff owned the house before the marriage and never transferred title to defendant, during the marriage the home was used as the family residence. Any monies expended on the house payment were, therefore, for the benefit of the family. Indeed, defendant must have anticipated paying the housing expenses, regardless of where the parties chose to live, when the decision was made for plaintiff to stay at home and raise the child while defendant worked. Under these circumstances, it was not inequitable for the trial court not to offset the cash payment by the amount of the increase in equity of the residence.²

We also find no inequity in the trial court’s decision to award plaintiff the Lumina. The record indicates that defendant purchased the Lumina just before the marriage for use in the marriage. Defendant only paid half of the price of the car before the marriage and paid the remainder during the marriage pursuant to a financing plan. Plaintiff’s share of the marital property was reduced by the fair market value of the Lumina in determining the amount of cash defendant owed plaintiff. Plaintiff’s 1981 vehicle was in disrepair and was not safe for transporting Chelsea, and defendant retained ownership of the Corvette. A review of the record does not leave a firm conviction that the award of the Lumina to plaintiff was inequitable.

Finally, defendant contends that he should not have been held responsible for \$1,285 in medical costs incurred by plaintiff for purposes of the divorce litigation. On October 28, 1992, the trial court entered an order giving temporary physical custody of Chelsea to plaintiff because of allegations by plaintiff that defendant sexually abused Chelsea. The trial court ordered the parties and Chelsea to undergo psychological examination by Dr. Allene Doctoroff concerning the allegations of sexual molestation. Pursuant to this order, defendant was to maintain health care coverage on behalf of Chelsea and was also held responsible for reasonable and necessary uninsured health care expenses.

The facts concerning the Doctoroff bill were offered piecemeal throughout the proceedings. Plaintiff testified that she visited Dr. Doctoroff a total of six times. The initial visit occurred before entry of the October 28, 1992, order. Plaintiff initiated this visit, accompanied by Chelsea, to discuss the allegations of sexual abuse. Dr. Doctoroff testified that she interviewed both parties to assist the court in its custody determination and to make an evaluation concerning the allegation of sexual abuse. She also conducted psychological testing on the parties.

The trial court’s factual finding that the medical bill was an outstanding medical obligation incurred during the marriage and the pendency of the divorce is not clearly erroneous. Plaintiff originally

sought the services of Dr. Doctoroff out of her concern for Chelsea's welfare. The medical services provided by Dr. Doctoroff also aided in the determination of the source of Chelsea's allegations that she had been touched by defendant and assisted the court in determining the custody issue. We find no inequity in the trial court's decision to hold defendant responsible for payment of the medical bill.

On cross-appeal, plaintiff contends that because defendant induced her into marriage with the promise that she would not have to work outside the home until Chelsea entered school, alimony should have been awarded for this time period so that she did not have to work outside the home. We disagree. As noted by the trial court, implicit in the promise was the expectation that the parties would remain married. It would be inequitable to require defendant to continue to support plaintiff based solely on the promise, without consideration of other relevant factors, *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991), because it was plaintiff who desired to end the marriage on which the promise was based. Under these circumstances, the "promise" is not a significant factor to be considered when awarding alimony. Because plaintiff has not set forth any additional arguments in support of her allegation that she was entitled to alimony, we cannot conclude that the trial court abused its discretion in denying alimony.

Plaintiff also contends that the trial court should have awarded her the full value of the Merrill Lynch account as a punitive sanction for defendant's willful concealment of the Merrill Lynch assets. A party's attempt to conceal assets in a divorce proceeding is only one of many factors the trial court must weigh in its decision, and such behavior does not give rise to automatic sanction of the party. *Hanaway*, *supra* at 298. A trial court's role in a divorce proceeding is to achieve equity and not to punish one of the parties. *Sands v Sand*, 442 Mich 30, 36; 497 NW2d 493 (1993). The trial court may, however, punish a party who conceals the full extent of the marital assets and engages in a pattern of "devious and deceptive conduct" in the divorce proceedings." *Id.*

Defendant's behavior in this case is readily distinguishable from the conduct of the defendant in *Sands*. Defendant did not engage in persistent conduct aimed at concealing the Merrill Lynch funds and never mislead plaintiff or the court regarding the *existence* of the Merrill Lynch assets. Although defendant would not reveal at his deposition the location of the assets withdrawn from the Merrill Lynch account, he did testify that the assets existed and had been withdrawn to pay his father. Defendant admitted that the Merrill Lynch account at one time contained \$37,000 and that the assets had been transferred to another account that was jointly held with his father. When plaintiff filed a motion seeking escrow of the withdrawn funds, defendant apparently complied with the trial court order to deposit the funds in the escrow account. Consequently, because defendant did not persistently attempt to conceal the Merrill Lynch assets, the trial court's decision to only award plaintiff half of the amount of the appreciation of the assets in the account was equitable.³

Finally, plaintiff maintains that the trial court abused its discretion in denying her motion for attorney fees. Attorney fees in a divorce action are awarded only as necessary to enable a party to

prosecute or defend a suit, and this Court will not reverse the trial court's decision to award or not to award attorney fees in a divorce proceeding absent an abuse of discretion. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). Attorney fees may also be authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation. *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2d 394 (1992). A party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support. *Hanaway, supra* at 298. Here, the record does not support plaintiff's allegation that she incurred attorney fees as a result of defendant's unreasonable conduct in the course of litigation. Rather, legitimate disputes regarding property, custody, and allegations of abuse existed, and both parties are guilty of filing voluminous pleadings.

We are unable, however, to properly review plaintiff's claim that the failure to award attorney fees was an abuse of discretion in light of plaintiff's unemployed status, low earning potential, and limited assets, and given defendant's considerable property and earnings. Although plaintiff requested a hearing on the issue of attorney fees, none was held. The trial court merely stated at trial, without explanation, that neither party was to receive attorney fees. On the record presented, it is impossible for this Court to evaluate plaintiff's claim that she is incapable of paying her attorney fees without invading assets that she is relying on for support. The proceedings in this case were extensive, and it is likely that plaintiff incurred substantial fees.⁴ Consequently, we find it necessary to remand this matter to the trial court for factual findings and for a determination of whether an award of attorney fees was necessary to allow plaintiff to carry on the divorce proceedings.

Affirmed in part and remanded to the trial court for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Maura D. Corrigan
/s/ Chad C. Schmucker

¹ No issues have been raised regarding child custody.

² The record reveals that plaintiff's father supplied the materials needed for repair of the house. Defendant supplied only the labor.

³ Plaintiff also raises additional questions that were not raised in the statement of questions presented. Issues raised on appeal by the appellant are limited to those issues raised in the statement of the questions presented. MR 7.212(C)(4); *Speaker-Hines & Thomas, Inc v Dep't of Treasury*, 207 Mich App 84, 91; 523 NW2d 826 (1994).

⁴ Plaintiff alleged that her attorney charged \$125 per hour. Although plaintiff failed to establish the amount of the fees, we note that defendant, whose attorney also charged \$125 per hour, incurred attorney fees of \$30,782.14 from June 1, 1992.