

STATE OF MICHIGAN
COURT OF APPEALS

TERRY JO WILSON,

Plaintiff–Appellee, Cross-Appellant,

v

RICHARD WILSON,

Defendant–Appellant, Cross-Appellee.

UNPUBLISHED

June 25, 1996

No. 182449

LC No. 90-041938-DO

Before: Marilyn Kelly, P.J., and Neff and J. Stempien,* JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce entered on January 5, 1995. Defendant challenges the trial court’s temporary award of alimony and inclusion of certain assets in the marital estate. Plaintiff cross-appeals the division of property and denial of attorney fees. We affirm in part and reverse in part.

I

The parties were married on June 24, 1984. No children were born to the marriage although plaintiff gave birth to one child during the separation, and the parties stipulated that defendant was not the father.

In 1987 the parties opened a business called Kale’s Collision of Westland. The business flourished and acquired two other Kale’s franchises in Michigan and exclusive franchise rights for eight counties in Florida. The parties worked together building the business from its beginning. Plaintiff performed secretarial, bookkeeping, and office managerial functions, and defendant was the manager. Ownership of the business was contested at trial. Defendant contended that his brother actually owned the business, while plaintiff contended that defendant’s brother owned half of the business and she and defendant owned half. The record indicates that defendant’s brother financed the business by paying \$5,000 for 5,000 shares of stock and loaning defendant and the corporation \$75,000. Defendant contends that he never owned shares, that he only held an option to purchase shares, and that because

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

he never repaid the \$75,000 loan, he lost his option to purchase shares. However, the record indicates that on August 1, 1990, the same day plaintiff told defendant that she was pregnant by another man and he fired her, defendant entered into a stock repurchase agreement with his brother in which the brother purchased defendant's 5,000 shares for forgiveness of the \$75,000 loan, plus paid defendant \$10,000 in cash and \$31,000 by way of a note payable.

One week after plaintiff filed for divorce, defendant withdrew \$453,327 from a Kale's Collision Merrill Lynch account, \$68,000 from his personal Merrill Lynch account, and closed a stock account worth \$4,299. Defendant also transferred a \$45,000 condominium to his aunt for \$1,000. Consequently, the court appointed a receiver to marshal the assets and ordered defendant to deposit \$168,000 in an escrow account with his attorney from which temporary spousal support, debts, and attorney fees were paid during litigation.

After trial, the court made rulings on items included in the marital estate. The court included fifty percent of the business, fifty percent of the business' Merrill Lynch account, and all of defendant's personal Merrill Lynch account. However, the court failed to assign a value to defendant's business interest. The court totaled the marital estate, subtracted the amounts paid from the escrow account, which included \$30,000 plaintiff had received in temporary spousal support, divided the net marital estate fifty-fifty, and then subtracted the value of assets plaintiff received free and clear, resulting in an order requiring defendant to pay plaintiff \$150,581.45.

II

Defendant first argues that the court erred in awarding temporary spousal support to plaintiff while the divorce was pending and then refusing to deduct that amount from plaintiff's share of the marital estate. We disagree. A trial court's factual findings relating to the award or modification of alimony is reviewed for clear error. *Mitchell v Mitchell*, 198 Mich App 393, 396; 499 NW2d 386 (1993). The main objective of alimony is, after considering all the circumstances, to balance the incomes and needs of the parties in a way that would not impoverish either party. *Hanaway v Hanaway*, 208 Mich App 278, 295; 527 NW2d 792 (1995).

We find no error in the court's award of temporary spousal support. Upon hearing of plaintiff's pregnancy and plans to divorce him, defendant fired plaintiff and withdrew all the money from his personal and business accounts. Defendant's conduct in eliminating plaintiff's source of income as well as access to the parties' cash left plaintiff with no means by which to pay her living expenses. Given these circumstances, the court did not clearly err in awarding spousal support during pendency of the divorce.

Defendant also argues that the court should have deducted the total amount of spousal support paid from plaintiff's award of the marital assets. Having determined that the court's findings and award of spousal support were not erroneous, we review the dispositional ruling for abuse of discretion and

will uphold it unless we are convinced that the property division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). The court totaled the marital estate, then deducted the amount paid by the escrow account and divided the remaining estate fifty-fifty between the parties. This manner of accounting for the amounts already paid is equitable in light of the facts presented.

Next, defendant contends that the court erred in finding that he was a half owner of Kale's Collision and including half of the Kale's Collision Merrill Lynch account as a marital asset. We disagree. Special deference is given to the trial court's ability to judge credibility of witnesses and their testimony at trial. *Thames v Thames*, 191 Mich App 299, 311; 477 NW2d 496 (1991). Because of defendant's elaborate attempts to conceal assets and disguise his business ownership, the trial court did not believe defendant's version of the business ownership, and we defer to the trial court's ability in this case to judge defendant's credibility. Accordingly, the court did not err in including half of the business and half of the Merrill Lynch account as marital assets. However, we conclude that the trial court erred in failing to value defendant's fifty percent share of the business.

Next, defendant contends that the court erred in including his inheritance as a marital asset. We agree. A trial court's decision to include inheritance in the valuation of marital assets is discretionary and is dependent upon the particular circumstances of a given case. *Demman v Demman*, 195 Mich App 109, 112; 489 NW2d 161 (1992). An inheritance may be treated as part of the marital estate "if an award otherwise was insufficient to maintain either party." *Id.* In the case before us, the parties agreed that approximately \$38,000 of defendant's personal Merrill Lynch account consisted of an inheritance he received in April or May 1990. Because the inheritance was received shortly before plaintiff filed for divorce, and the size of the marital estate was sufficient to maintain the parties, the inheritance should not have been included in the marital estate. Unfortunately, the court did not mention disposition of the inheritance in its findings, but simply found the account into which the inheritance was deposited to be a marital asset. Thus, on remand, the court should subtract the inheritance from the total marital estate before dividing it.

III

On cross-appeal, plaintiff contends that she should have been awarded the assets which defendant attempted to conceal. We disagree. There is no automatic rule of forfeiture for concealing assets. *Sands supra*, at 31. The consequences for such conduct must be decided on the facts of each case and the circuit court must equitably divide assets on the basis of the facts. *Id.* The judge's role is to achieve equity, not to "punish" one of the parties. *Id.* at 36. On the record before us, it is apparent that defendant attempted to conceal assets from plaintiff; however, that does not result in the automatic forfeiture of those assets. The trial court included the assets in the marital estate and found that a fifty-fifty division was equitable. Given the record before us, this was not erroneous.

IV

Plaintiff contends that the trial court erred in refusing to award attorney fees. We agree. An award of attorney fees in a divorce action is reviewed for abuse of discretion. *Hanaway, supra*, at 298. Attorney fees in a divorce action are generally awarded only as necessary to enable a party to prosecute or defend a suit, but 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. *Id.* A party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support. *Id.*

Plaintiff filed her complaint for divorce on August 17, 1990 and the divorce was not final until January 5, 1995. Defendant's conduct in trying to conceal assets from plaintiff and the court directly caused this protracted litigation. Plaintiff should not be required to use proceeds from her property award to pay her attorney fees resulting from defendant's conduct. Thus, the court abused its discretion in refusing to award attorney fees to plaintiff.

We affirm the judgment of divorce and the fifty-fifty division of the marital estate but reverse the court's denial of plaintiff's request for attorney fees. We remand for recalculation of the marital estate to exclude defendant's inheritance and include the value of the business. We do not retain jurisdiction.

/s/ Marilyn Kelly

/s/ Janet T. Neff

/s/ Jeanne Stempien