STATE OF MICHIGAN

COURT OF APPEALS

CONNIE M. KAPLAN,

Plaintiff–Appellee,

v

JOHN L. KAPLAN,

Defendant–Appellant.

UNPUBLISHED
May 23, 1997

No. 177460
Wayne Circuit Court
LC No. 92-214038-DM

Before: Wahls, P.J., and Young and Beach*, JJ.

PER CURIAM.

Defendant appeals by right the judgment of divorce. We affirm.

The parties were married in 1976 and had one son in 1978. Plaintiff Connie Kaplan filed for divorce in May 1992. The circuit court thereafter entered a mutual injunctive order that prohibited either party from destroying, transferring or disposing of their personal property, except for necessities. Nonetheless, defendant removed personal property from the home.

The parties traded various allegations of misconduct. Defendant alleged that: (1) plaintiff threw out her own clothes and falsely told the police that defendant had done so, (2) plaintiff called the police when defendant merely moved his stereo into another room, (3) plaintiff hit defendant in May 1992, and (4) her son from a previous marriage threatened to kill defendant. In turn, plaintiff alleged that defendant: (1) withdrew over $34,000 from joint accounts from January through July 1992; (2) in February 1992, induced plaintiff to obtain a loan of $13,000, for which she alone was liable; (3) physically abused plaintiff; (4) removed personal property from the home in contravention of the injunction; (5) destroyed personal property belonging to plaintiff; and (6) asked utility companies to shut off service to the marital home while plaintiff was living there.

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

In October 1992, the Friend of the Court issued an order of commitment against defendant because he was over $2,000 in arrears for child support. In June 1993, the circuit court ordered defendant to liquidate assets to pay the amount required to prevent foreclosure on the marital home because defendant had not paid the court-ordered portion of the mortgage payment.

On November 1, 1993, the court ordered defendant to liquidate martial assets to pay $1,500 for the private school tuition of the parties' child. The court also ordered defendant to appear on November 10, 1993 and give testimony. But on November 10, 1993, Judge Michael Callahan was substituted as the trial judge, and sometime later, trial was scheduled for December 4, 1993. Defendant then did not appear for the trial on December 4, 1993. In his letter to the judge, defendant explained that he would not attend trial because he did not want to risk being arrested for noncompliance with the court's prior orders.

In the default judgment of divorce, the court ordered defendant to pay alimony to plaintiff of $60.00 per week until their minor child graduated from high school and, for 24 months thereafter, $75.00 per week. The court awarded plaintiff the marital home, but ordered defendant to be responsible for the second mortgage, finding that defendant had taken the proceeds for personal purposes while plaintiff had paid off marital debts with her portion of the second mortgage.[1] The court equally divided the following items: (1) the stock, (2) the mutual fund, and (3) defendant's retirement fund.[2] The court awarded to defendant $23,258.16 in proceeds from a lawsuit because it was not a marital asset. The court ordered defendant to pay $15,000 to plaintiff because defendant took or destroyed many items of personal property without court order or discussion with plaintiff. Also, the court ordered defendant to pay plaintiff's attorney fees due to "the consistent refusal of Defendant to obey the orders of the Court, and his actions which required a second trial of this cause . . . ."[3]

Defendant filed a motion for stay and for order posting bond in March 1994. In May 1994, the court issued a bench warrant for defendant's arrest for failing to appear at a hearing on April 1, 1994. In October 1994, the court issued an order for defendant to be held pending a cash bond for his failure to appear at a May 1994 hearing. On January 5, 1995, the court denied defendant's motion to stay the judgment of divorce.

Defendant first argues that the circuit court erred in assessing his credibility based on solely his deposition testimony and in relying on this assessment when distributing the marital estate. We disagree.

Where defendant failed to appear at the hearing to determine the distribution of the parties' marital estate, the circuit court justifiably relied on defendant's deposition testimony in assessing defendant's credibility. See *In re Benker Estate*, 416 Mich 681, 697 n 8; 331 NW2d 193 (1982); *In re Hardin*, 184 Mich App 107, 109; 457 NW2d 347 (1990); *Fulton v Fulton*, 143 Mich App 187, 190; 371 NW2d 524 (1985). We find it ironic that defendant asserts on appeal that plaintiff "seeks to have her cake and eat it too by ignoring all of the Court Rules" when defendant himself refused to attend the trial. Defendant's choice to absent himself from the jurisdiction forced the court to decide the case solely on the evidence before it. *Currey v Currey*, 109 Mich App 111, 119; 310 NW2d 913 (1981). We give special deference to the trial court's findings when they are based on a determination of

credibility. *Arco Industries Corp v American Motorists Inc Corp,* 448 Mich 395, 410; 531 NW2d 168 (1995); *Doe v Ewing*, 205 Mich App 605, 609; 517 NW2d 849 (1994); *Sullivan Industries Inc v Double Seal,* 192 Mich App 333, 349; 480 NW2d 623 (1991). The circuit court properly used its credibility assessment when distributing the marital estate.

Defendant next asks this Court to review the circuit court's order, specifically the distribution of property, on its merits. After refusing to appear before the circuit court, defendant now asks this Court to overturn the judgment of divorce. Defendant's failure to appear for trial speaks for itself. We will not endorse defendant's attempt to contrive an appellate parachute for his own decision to absent himself from trial. See *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 542; 529 NW2d 318 (1995) (Jansen, J., dissenting).

Moreover, defendant willfully disobeyed court orders. This situation does not present a default. Defendant offers this Court no substantive explanation for ignoring the circuit court's repeated orders for his appearance. Defendant's noncompliance makes us reluctant to reward his behavior. Defendant refused to submit to the circuit court's authority, yet now appeals to this Court for relief. Additionally, defendant's nonappearance leaves this Court with the same record that the lower court had – an incomplete one, given that defendant failed to appear at trial.

Further, based on the record before us, we cannot say that the circuit court inequitably distributed the parties' marital estate. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). We review findings of fact in a divorce action under a clearly erroneous standard. *Wiley v Wiley*, 214 Mich App 614, 615; 543 NW2d 64 (1995). In examining dispositional rulings, we ask whether we are left with a firm conviction that the trial court's decision was inequitable. *Id.* In *Sparks v Sparks,* 440 Mich 141; 485 NW2d 893 (1992), our Supreme Court held that in determining an equitable distribution of marital property, a trial court should consider: (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 status of the parties, (6) the necessities and circumstances of the parties, (7) the earning abilities of the parties, (8) the past relations and conduct of the parties, and (9) general principles of equity. *Id.*, 159-160. The circuit court must make specific findings of fact regarding any of the factors listed above that are relevant to its determination of how the property should be divided. *Id.*, 159.

After reviewing the record, we determine that the court carefully considered the parties' circumstances. Although the court did not discuss exhaustively each factor, it did discuss the relevant factors. Moreover, it individually addressed each property item. We find that the court did not err in its disposition of those items it equally divided.[4] We likewise have no quarrel with the court's award to plaintiff of $15,000, which the court found to be the value of the property that defendant had removed from the home in violation of the court order.

The court awarded outright to plaintiff the $118,900 house, which had an outstanding mortgage of $70,000. Plaintiff thus realized a $48,900 gain on the house. The court, however, awarded defendant $23,258.16 in proceeds from a lawsuit. Also, the court considered that defendant has a

higher earning capacity than does plaintiff. We are not left with a firm conviction that the decision was inequitable.

Additionally, defendant argues that the circuit court impermissibly took into account defendant's fault after the divorce petition was filed. Defendant confuses the meaning of "fault" in this context. The court did not consider defendant's fault in the breakdown of the marriage, which is improper under *Knowles v Knowles*, 185 Mich App 497, 499; 462 NW2d 777 (1990). Rather, the court noted that defendant's removal of furniture from the marital house was in direct contravention of the court's order. The court described defendant's recalcitrance and obstruction of court proceedings. The court was not contemplating defendant's fault for the breakdown of the marriage – the court was holding defendant responsible for his actions in defiance of its orders.

Also, defendant contends that the circuit court erred in determining the amount of alimony to which plaintiff was entitled. We review de novo a dispositional ruling regarding alimony. *Ianitelli v Ianitelli*, 199 Mich App 641, 642; 502 NW2d 691 (1993). In determining whether to award alimony, the circuit court should consider the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health, their prior standard of living, and fault, if any. *Ianitelli, supra* at 643; *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991). If any of the factors are relevant to property or to the needs of the parties, the trial court shall make specific findings of fact regarding those factors. *Sparks, supra*, 440 Mich at 163.

We agree with defendant that the circuit court failed to make findings of fact regarding all the alimony factors. Nonetheless, the award does not fail on this point. In awarding alimony, the judge first noted that "it's impossible for me to establish on this record an adequate basis [for alimony because defendant] voluntarily absented himself from these proceedings."

Further, the court considered relevant factors: the ability of plaintiff and defendant to work, their present incomes, and their individual needs. The court noted that alimony was a way to equalize the parties' earning potential. The court considered that plaintiff, who had only a high school education, requested alimony to pay tuition so that she could return to school. The court was aware of the length of the marriage and the parties' ages. The parties' health was not at issue. The court did not mention the parties' conduct before the divorce, but noted defendant's difficult behavior during the course of the action. Given defendant's obstructionistic conduct, we do not find dispositive the court's failure to discuss the parties' ability to pay, their prior standard of living, and fault. Accordingly, the court sufficiently considered and discussed the relevant factors in awarding alimony.

Finally, defendant argues that the circuit court abused its discretion in awarding plaintiff attorney fees. We disagree. An appellate court will not reverse an award of attorney fees absent an abuse of discretion. *Hanaway v Hanaway*, 208 Mich App 278, 297; 527 NW2d 792 (1995).

In this case, the circuit court awarded attorney fees to plaintiff because of defendant's unreasonable conduct during the litigation. The court found that defendant was contemptuous,

recalcitrant, and that his actions in ignoring court orders had unnecessarily prolonged the proceedings. Attorney fees are authorized under these circumstances. *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2d 394 (1992); *Thames, supra*, 191 Mich App at 310.

Affirmed. As the prevailing party, plaintiff may tax costs under MCR 7.219.

/s/ Myron H. Wahls
/s/ Robert P. Young, Jr.
/s/ Harry A. Beach

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[1] The second mortgage totaled $12,000, of which plaintiff had withdrawn $2,500 to pay the private school tuition of the parties' son.

[2] Defendant asserts that plaintiff was not entitled to funds from the stock or mutual fund because he owned them before the marriage.

[3] After the first trial began, defendant only then revealed that in 1980 he and the judge, who was then an attorney, previously had engaged in a "heated discussion" where the judge "almost became physical." The judge thereafter recused himself.

[4] We decline to rule on the court's disposition of the right to purchase Michigan football tickets.