

STATE OF MICHIGAN
COURT OF APPEALS

LAURIE ANN KLESCZEWSKI,

UNPUBLISHED
August 22, 2000

Plaintiff/Counterdefendant-Appellee,

and

LAURIE KLESCZEWSKI, as Personal Representative
of the Estate of GLADYS TOEGEL,

Intervening Plaintiff-Appellee,

v

No. 213288
Macomb Circuit Court
LC No. 96-006399-DO

STEVE W. KLESCZEWSKI, a/k/a STEVE
GAMBINO,

Defendant/Counterplaintiff-Appellant.

Before: Owens, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce, challenging the trial court's order that the marital property be sold, the exclusion of evidence during trial, the apportioning of marital debt, and plaintiff's award of alimony. We affirm.

Defendant first argues that the trial court did not have authority to order the sale of the real property. We disagree. In a divorce action, we must first review the trial court's findings of fact for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995). A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Mitchell v Mitchell*, 198 Mich App 393, 396; 499 NW2d 386 (1993). If the trial court's findings of fact are upheld, we must then decide whether the dispositive ruling was fair and equitable in light of all the circumstances. *Sparks, supra* at 151-152. The ruling will be affirmed unless we are left with a firm conviction that the division was inequitable. *Sparks, supra* at 152; *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

Pursuant to MCL 552.103; MSA 25.133,¹ the trial court had authority to order that the property be sold. Plaintiff, defendant, and Toegel, plaintiff's mother, held the property as joint tenants with rights of survivorship, and all three property owners were included as parties to this action. In fact, Toegel filed a motion to intervene in the lower court specifically to protect her interest in the property.² The plain and unambiguous language of § 103 gives a trial court in a divorce action the authority to order the sale of property held by the parties as joint tenants. It is well-settled that if statutory language is clear and unambiguous, judicial construction is precluded. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 346; 578 NW2d 274 (1998); *Shields v Shell Oil Co*, 237 Mich App 682, 689; 604 NW2d 719 (1999). Because all owners of the property were included as parties in this action, and they held the property as joint tenants, § 103 gave the trial court authority to order that the property be sold. In any event, the trial court did not impair Toegel's property rights because she testified that she wanted the property to be sold.³

Defendant further contends that the trial court did not have authority to order the sale of the property because this was a divorce action and not an action for partition. However, § 103 authorizes a trial court in a divorce action to order sale of the parties' property. Furthermore, as we have noted, plaintiff, defendant, and Toegel requested that the court divide the real property between the parties. A party may not take one position in the trial court and then seek relief on appeal by taking a contrary

¹ MCL 552.103; MSA 25.133 provides:

The bill of complaint or amendment thereto, or the answer or cross bill or amendment thereto, filed in any divorce proceeding may ask that the ownership of the lands described therein and owned by the parties to such suit as joint tenants or as tenants by entireties shall be determined by the decree of divorce, if granted, and in such case the court granting the divorce may award such lands to 1 or the other of said parties, or any part of it to either of them, or may order such lands to be sold under the direction of a circuit court commissioner, and the proceeds thereof divided between the parties in such proportion as the court shall order; or may appoint commissioners to partition such lands between the parties in the proportion fixed by the decree. The proceedings following the appointment of such commissioner shall conform to the law governing the partition of lands between tenants in common.

² We note that the record does not indicate, and defendant does not claim, that defendant objected to Toegel's motion to intervene. Having failed to object in the trial court, defendant is precluded from raising an objection in this Court to Toegel's intervention. *Napier v Jacobs*, 429 Mich 222, 228; 414 NW2d 862 (1987). In any event, because there was no objection to Toegel's intervention, and because the parties agree that Toegel owned the marital premises as a joint tenant with the right of survivorship, the trial court properly granted Toegel the right to intervene pursuant to MCR 2.209(A)(3).

³ We also note that plaintiff, in her complaint, and defendant in his answer and in his counter-complaint, asked the court for a division of the real property owned by the parties. Apparently, defendant would now contend that by asking for a "division" of the real property, he did not intend to seek a "sale" of the property.

position.⁴ *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Therefore, defendant's argument fails.

Defendant next argues that the trial court erred by excluding evidence of the 1976 written agreement by which Toegel established the joint tenancy. We disagree. We review a trial court's decision whether to admit evidence for an abuse of discretion. *Chmielewski v Xermac, Inc.*, 457 Mich 593, 614; 580 NW2d 817 (1998). An abuse of discretion occurs when an unbiased person, considering the facts upon which the trial court relied, would conclude that there was no justification or excuse for the decision. *Detroit/Wayne Co Stadium Authority v 7631 Lewiston, Inc*, 237 Mich App 43, 47; 601 NW2d 879 (1999). Any error in the admission or exclusion of evidence will not mandate reversal unless a substantial right of a party was affected. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999).

Generally, all relevant evidence is admissible, and irrelevant evidence is inadmissible. MRE 402; *Ellsworth, supra* at 188-189. Relevant evidence is evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401; *Ellsworth, supra* at 188. Relevant evidence may be excluded, however, if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Chmielewski v Xermac, Inc*, 216 Mich App 707, 710; 550 NW2d 797 (1996), *aff'd* 457 Mich 593 (1998). Factors to consider in making this determination are: the time necessary to present the evidence and the potential for delay; whether the evidence is cumulative; how directly the evidence tends to prove the fact in support of which it is offered; how important the fact sought to be proved is; the potential for confusion; and whether the fact can be proved another way with fewer harmful collateral effects. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 362; 533 NW2d 373 (1995).

The trial court found that laches and the statute of limitations rendered the written agreement inadmissible. While the trial court properly found that the evidence was inadmissible, it did so for the wrong reasons. Laches is a tool of equity that is used to remedy the inconvenience resulting from a plaintiff's delay in asserting a legal right. *Dep't of Public Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996). It is applicable in cases where there is an unexcused and unexplained delay in commencing an action against a defendant and a corresponding change of material condition exists such that it would be inequitable to enforce a claim against the defendant. *Id.*; *Lothian v City of Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982). Laches does not apply in this case because no action was ever brought against Toegel to recover the funds that defendant claims he paid in utility payments.

⁴ At trial, defendant attempted to argue that Toegel, as an intervening third party, had not filed any pleadings seeking to partition the property and that the court therefore could not rule on the rights of the intervening third party to obtain a partition. This objection did not contend that the trial court was without authority to order a sale of the real estate, nor did it constitute an objection by defendant to such a sale. Rather, defendant was apparently objecting that the intervening third party could not force a sale of the real estate. That objection is different than the issue defendant now presents on appeal. *Napier, supra*.

The statute of limitations does not apply in this case for the same reasons. A limitations period delineates the time within which a plaintiff may file an action. *Lothian, supra* at 165; *Shields v Shell Oil Co*, 237 Mich App 682, 689; 604 NW2d 719 (1999). If a cause of action is brought after the expiration of the period specified by the applicable statute of limitations, a defendant has an affirmative defense to the action. *Lothian, supra* at 166; *Shields, supra* at 690. As previously stated, defendant did not bring an action against Toegel to recover any funds spent in utility payments; therefore, the statute of limitations was inapplicable.

The evidence was properly excluded, however, because it was not relevant to the issues presented in this action. Whether Toegel made the utility payments did not impact on her status as a one-third owner of the property. A failure to make utility payments would not have rendered Toegel's title to the property void. Defendant's proper course of action would have been to file a breach of contract suit against Toegel to reclaim the money that he claims to have spent making the utility payments. However, whether Toegel made the monthly utility payments from seventeen years prior to trial through the time of trial was simply irrelevant to whether Toegel was a joint owner of the property. Because a failure to make the payments would not have impacted upon Toegel's status as a property owner, the trial court properly ruled that the evidence was inadmissible. We will not reverse a trial court if it reaches the correct result, albeit for the wrong reason. *Hall v McRea Corp*, 238 Mich App 361, 369; 605 NW2d 354 (1999).

Defendant next contends that the allocation of marital debt was unfair and inequitable. We disagree. A property distribution should be fair and equitable in light of all the circumstances. *Welling v Welling*, 233 Mich App 708, 710; 592 NW2d 822 (1999); *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). The distribution need not be mathematically equal, but significant departures from congruence should be explained clearly by the trial court. *Welling, supra* at 710; *Byington, supra* at 114-115. Factors to consider when dividing marital property are: the duration of the marriage; the contribution of each party to the marital estate; each party's station in life; each party's earning ability; each party's age, health, and needs; fault or past misconduct; and any other equitable circumstance. *Welling, supra* at 710; *Byington, supra* at 115. Each factor need not be given equal weight where the circumstances dictate otherwise. *Welling, supra* at 710; *Byington, supra* at 115.

The circumstances illustrated that plaintiff's earning potential was much lower than that of defendant. Plaintiff has very few job skills other than a cosmetology license that she cannot utilize because she is allergic to the various chemical solutions necessary to perform the work. At the time of trial, she was working at a pizzeria, making \$5.75 per hour. She was previously employed as a cook at a bowling alley, earning \$6 per hour, but could work only thirty hours per week. She left that job when her hours decreased after the winter bowling leagues ended. Defendant, on the other hand, possesses many employable skills and can work as an auto mechanic, a bump and paint technician, or a truck driver. In 1997, defendant earned about \$45,000. At the time of trial he was working at Detroit Center Tool, earning a net pay of \$450 per week. He made all the house payments himself throughout the marriage and separation and was able to pay many of the marital debts prior to trial.

Therefore, both plaintiff's and defendant's testimony illustrated the gross disparity in earning potential. The trial court placed much more emphasis on this factor than on any other factor. Even

considering the other factors, however, the trial court's allocation of debt to defendant was not unfairly disparate. The marriage was of relatively long duration, and defendant supported the family during the marriage. While defendant did not need to struggle to support himself during the separation, plaintiff had to find a job that paid enough money to support herself. Given plaintiff's current circumstances, she would not have been able to afford to pay any additional marital debts.

Fault is also a proper consideration in matters of property division. *Welling, supra* at 710; *Byington, supra* at 115; *Ackerman v Ackerman*, 163 Mich App 796, 808; 414 NW2d 919 (1987). The trial court ordered defendant to pay plaintiff's outstanding medical bills. Her insurance would have covered the expenses if defendant had not canceled it, and defendant refused to reinstate plaintiff's health insurance despite a court order that he do so. Consequently, defendant was at fault for plaintiff's outstanding medical bills. Moreover, regarding the court's order that defendant pay plaintiff's attorney fees, an award of attorney fees is appropriate where necessary to enable a party to prosecute or defend a divorce action. *Heike v Heike*, 198 Mich App 289, 294; 497 NW2d 220 (1993). Attorney fees were appropriate in this case because plaintiff could not afford to pay her attorney fees on her own.

Furthermore, the allocation of debt to defendant was not as disparate as defendant argues. Defendant did not take into account the \$1,686 that plaintiff paid to cover the 1994 delinquent property taxes and the \$4,000 that she paid toward the IRS debt. In any event, the allocation of debt is not required to be mathematically proportionate to the parties' incomes, and the trial court clearly explained its reasoning for apportioning the debt as it did.

Defendant's final issue on appeal is that the trial court erred by awarding alimony to plaintiff. We again disagree. We review a trial court's factual findings relating to an award of alimony for clear error. *Mitchell, supra* at 396. A trial court has the authority, under MCL 552.23; MSA 25.103, to award alimony as the court considers "just and reasonable." *Ianitelli v Ianitelli*, 199 Mich App 641, 642-643; 502 NW2d 691 (1993). The main objective of alimony is to balance the incomes and needs of the parties so that neither party will become impoverished. *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996); *Hanaway, supra* at 295. Factors to consider when determining whether to award alimony include: (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 ability 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) general principles of equity, and (13) fault, if any. *Ianitelli, supra* at 643; *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991).

It is clear from the record that plaintiff's minimal earning capacity as compared to defendant was the trial court's primary reason for awarding plaintiff rehabilitative alimony. Without alimony, defendant would be able to enjoy the same standard of living as before the divorce, while plaintiff would have become impoverished. See *Magee, supra* at 164.

Alimony was appropriate in light of the remaining factors as well. *Ianitelli, supra* at 643; *Thames, supra* at 308. The marriage lasted for about eighteen years, and defendant had the ability to

pay alimony. Although plaintiff was awarded one-half of the remaining proceeds from the sale of the house after Toegel received her share and the debt to SOC Credit Union was paid, the main consideration in an alimony award is on the income-earning potential of the parties. *Hanaway, supra at 296*. Plaintiff should not be expected to consume her property award in an attempt to support herself. *Id.* Furthermore, while defendant claims that plaintiff's extramarital affair was the cause of the dissolution of the marriage, he was willing to reconcile afterward and accepted plaintiff back into the marital home. As such, plaintiff's infidelity could not have been the sole cause of the marital breakdown. The trial court's award of alimony was fair and equitable considering all the facts and circumstances.

Affirmed.

/s/ Donald S. Owens

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald