

STATE OF MICHIGAN
COURT OF APPEALS

EILEEN K. HIGHTOWER,

Plaintiff/Counter-Defendant-
Appellee,

v

LARRY DAVID HIGHTOWER,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED

July 20, 2004

No. 245725

Midland Circuit Court

LC No. 01-004472-DO

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from the parties' judgment of divorce. The trial court awarded plaintiff \$41,500 for her interest in the marital home and one-half of the parties' Amazon.com stock. The trial court also awarded plaintiff \$150 per week in rehabilitative spousal support for one year and \$3,000 for attorney fees. The duration of the marriage was eighteen months and no children were born of the marriage. We affirm.

Defendant first argues that the trial court incorrectly determined that the parties' marital home was a marital asset. Defendant contends that the marital home was his separate property and no exception existed for invading this asset.

In a divorce action, the trial court must make findings of fact and dispositional rulings. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d (1993). The factual findings are to be upheld on appeal unless they are clearly erroneous. *Id.* A factual finding is clearly erroneous if, after a review of the trial court's entire record, this Court has the definite and firm conviction that a mistake was made. *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002). A dispositional ruling "should be affirmed unless the appellate court is left with the firm conviction that [it] was inequitable." *Sands, supra* at 34, quoting *Sparks v Sparks*, 440 Mich 141, 152; 485 NW2d 893 (1992).

In dividing property in a divorce proceeding, the trial court's first consideration is the determination of what is marital and what is separate property. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). The trial court should include all property that came "to either party by reason of the marriage as part of the marital estate." MCL 552.19. Further, the court should "strive for an equitable division of increases in marital assets 'between the

beginning and the end of the marriage.” *Id.* at 493, quoting *Bone v Bone*, 148 Mich App 834, 838; 385 NW2d 706 (1986) (emphasis omitted). When the parties have commingled their separate property or used it for joint purposes, an appellate court will consider the parties’ intent in regard to including the assets in the marital estate. See *Polate v Polate*, 331 Mich 652, 654-655; 50 NW2d 190 (1951) (affirming distribution of a building to both parties although it was owned by the husband before the marriage, but put into both parties’ names); *Ross v Ross*, 24 Mich App 19, 30-31; 179 NW2d 703 (1970).

Defendant maintains that the home was defendant’s separate property because he supplied \$150,000 of the equity in the home, compared to plaintiff’s \$20,000 contribution. Further, defendant contends that because the marriage was short-term and childless, he should be returned to his premarital position.

In short-term, childless marriages, with few economic consequences, premarital property is often returned to the parties and only the assets that are accumulated during the marriage are divided between the parties. *Bone, supra* at 837. In this case, however, the trial court determined that this rule did not apply because there were “significant and legal consequences attached to the joint decision of these parties to merge their assets and create their marital estate as they did.” Specifically, the trial court made the following findings in its determination that the marital home was a marital asset subject to distribution:

The testimony surrounding the question of how they managed to merge their assets in this short-term marriage is interesting. Plaintiff testified that the church frowned on pre-marital agreements and encouraged them to come together as a couple spiritually as well as financially. She says that is what they did, and she is correct – that is exactly what they did. Defendant only agrees on the statement that the church frowns on pre-marital agreements. He says they never discussed joint property and never intended the consequences of joint property. He now says that he ‘wanted his property to go to his heirs.’ Whether his wife was included in that statement goes unanswered. In his testimony, he admits going to the pre-marital seminar at the church, and that the church counseled against pre-marital agreements. But he says that the joint tenancy is all her fault, was never discussed, and not his intention. His testimony is unpersuasive. The parties did exactly what the plaintiff says they were counseled to do. Defendant cannot get out from under decisions jointly made prior to marriage and carried out through church counsel, no matter how ill advised in retrospect, by simply denying all and claiming confusion and being duped.

The record reveals that (1) that the parties agreed to follow the teachings of their church, which had counseled that when two people are married they should merge their funds together; (2) the parties, in fact, did merge their funds; (3) the parties agreed to purchase a house together and selected the marital home together; (4) plaintiff put \$20,000 toward the purchase price of the marital home; (5) defendant put \$150,000 toward the purchase of the marital home; and (6) the parties purchased the marital home together and put the title in both parties’ names, thereby creating a joint tenancy. These facts are sufficient to support the trial court’s finding that the marital home was a marital asset.

Although it is defendant's position that he never intended to equally share the equity in the marital home with plaintiff, the trial court rejected this argument as unpersuasive and determined that plaintiff's recollection of the parties' intent was more probable. The trial court's finding of the intent of the parties based on the testimony given by the parties is an issue of credibility for the trial court to determine. "This Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses." *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Deferring to the trial court's superior ability to assess witness credibility, we find no clear error in the trial court's finding that the parties intended to treat the marital home as a marital asset.¹ *Polate, supra* at 652, 654-655; *Ross, supra* at 24.

Defendant also asserts that the trial court's findings of fact regarding the parties' contributions to the marital estate, defendant's income, and plaintiff's inability to obtain employment were clearly erroneous. The trial court made the following findings of fact:

This is a short-term marriage and the contributions to the marital estate are quite unequal. The equity in the marital home is \$180,000. The plaintiff brought a total of \$32,500 to the marriage. She took out \$18,400 of the marital equity when the parties separated in August of 2001. The rest of the marital equity is from the defendant. If those two factors were all the court were to look at, they would be persuasive in favor of defendant's argument. Two factors are irrelevant in this case. There are no health or fault issues. Defendant raised the question of fault, but the court has already addressed those rather pathetic attempts of defendant to paint an absolutely absurd picture of the plaintiff. All the remaining factors support the plaintiff's position, or at least some variation of the argument.

Defendant is in a far better position at this time than is the plaintiff. As indicated, his business is generating income in the area of \$100,00 a year. He owns his business, will receive the marital home and IRA's and other assets not at issue. Plaintiff, on the other hand, is a victim of the economic times. She has been "down sized" at age 53. She's been unemployed for almost a year and has been unable to find a new position. Her unemployment ran out a few months ago and she has been getting along with day-to-day living expenses with the help of friends and no assistance from the defendant. The combination of her age, general circumstances, ability to earn, and general principals [sic] of equity cry out to the court to provide a reasonable amount of the marital estate, giving due deference to defendant's obvious issues of length of marriage and contribution.

¹ The trial court further stated that "even if the court had found that the home was a separate property, in effect, giving the defendant the benefit of a pre-marital agreement that they both unwisely did not enter into, the facts of this case would cause the court to invade that separate property for purposes of providing suitable support to the plaintiff based on her need. MCL 552.23."

Defendant's argument that the trial court should have given more weight to the fact that he contributed nearly all the equity in the marital estate is without merit. Contribution toward the acquisition of the marital estate is but one of the factors to be considered in the equitable division of the property. The trial court must consider all relevant factors, without assigning disproportionate weight to any one factor. *Sparks, supra* at 158.

With regard to defendant's income, the trial court's finding that defendant made an annual income in the area of \$100,000 is not clearly erroneous. Defendant testified that he pays himself a salary of \$39,000 annually. He also testified that in 2000 he earned \$80,000 to \$90,000 from salary and profits, and in 2001 he earned \$103,000. In 1999, defendant earned \$19,000 in profits, and in 2002 he expected to earn \$35,000 - \$40,000 in profits. The average of the profits defendant testified he earned or will earn is \$59,250.² Adding defendant's reported salary leads to an annual income of \$98,250.

Defendant also argues that the trial court's finding regarding plaintiff's inability to find employment was clearly erroneous. Plaintiff testified that she actively sought employment by networking and attending job search groups, but had been unable to find employment. Further, plaintiff testified that the messages regarding job opportunities that defendant left on her answering machine did not leave information that would enable her to follow up on the opportunities. On this record, we cannot conclude that the trial court's finding that plaintiff was unable to find employment was clearly erroneous.

Defendant also argues that the property distribution was inequitable. If the trial court's findings of fact are upheld, this Court must next determine whether the dispositive ruling was fair and equitable in light of those facts. *Sparks, supra* at 151-152. The dispositional ruling is an exercise of discretion and should be affirmed unless this Court has the firm conviction that the property division was inequitable. *Id.* at 152.

In distributing marital assets, the goal is to reach an equitable property distribution in light of all the circumstances. *McNamara, supra* at 188. The trial court is given broad discretion in its ruling. *Sparks, supra* at 158-159. The division need not be mathematically equal, but any significant departure from congruence must be clearly explained by the trial court. *McNamara, supra* at 188.

In dividing the parties' marital estate, the trial court stated as follows:

The balancing of the equities here favor the disposition of a percentage of the marital estate which is primarily the marital home somewhat less than 50 percent. The court has already found that a complete recognition of a tenancy by the entireties in the marital home would be unfair and inequitable. It is the decision of the court that the plaintiff should realize at the least the same percentage of the home as if the defendant had died intestate and she was the surviving spouse. Under the Dower provisions of the Probate Code, . . . she

² This figure is calculated using the lower estimates reported by defendant.

would receive one-third of the equity in the home. That is a good benchmark for the court to start from in this case. That figure would be \$60,000. From that, the court will subtract the portion of the marital estate she received in the summer of 2001, namely, \$18,400. This leaves a figure owing to the plaintiff of \$41,500. The defendant will be awarded the marital home subject to the mortgage and will have 90 days to raise the plaintiff's share and to remove her from the mortgage. She shall have a judicial lien against the premises to protect her interest. After 90 days, that amount owing will bear interest at the rate of 5 percent per annum and she shall have the ability to collect actual attorney fees and costs for any action necessary to enforce this provision.

Both parties are awarded all personal property in their respective possession including automobiles, furniture and furnishings, as well as all pension or retirement benefits and bank accounts. The Amazon stock will be divided equally. In addition, the plaintiff is awarded all jewelry purchased, gifted to, or owned by her. She is also awarded the binoculars.

The trial court awarded roughly \$138,700 to defendant and \$41,700 to plaintiff.³ The trial court's property division was equitable in light of all the circumstances.

Defendant also argues that the trial court's award of rehabilitative spousal support of \$150 a week for one year is inequitable because plaintiff possesses the ability to support herself. This Court reviews the trial court's factual findings relating to an award of alimony for clear error. *Mitchell v Mitchell*, 198 Mich App 393, 396; 499 NW2d 386 (1993). A factual finding is clearly erroneous if this Court is left with a firm conviction that a mistake was made. *Id.* If the factual findings are not clearly erroneous, this Court must then decide whether the dispositional ruling granting alimony was fair and equitable in light of the facts. *Id.*

The trial court has the discretion to award alimony as it considers just and reasonable under all of the circumstances relevant to a case. MCL 552.23. Principles similar to those considered in the property distribution apply in determining whether to award spousal support. *Hanaway v Hanaway*, 208 Mich App 278, 295; 527 NW2d 792 (1995). The main objective of alimony is to balance the incomes and needs of the parties in a way that would not impoverish either party. *Id.*

In awarding plaintiff temporary or rehabilitative alimony in the amount of \$150 a week for a period of one year, the trial court determined that plaintiff's circumstances, as analyzed under the property distribution, supported such an award. The trial court also held that the alimony award was modifiable and subject to termination on specific events, including plaintiff obtaining employment.

³ These figures are based on the \$180,000 of equity in the marital house and an estimate of the value of certain stock.

Defendant argues that alimony is only appropriate where the parties were married for a significant duration and the spouse requesting alimony worked in the home in lieu of learning employable skills. Defendant asserts that in such circumstances, the award of alimony would allow that spouse financial support while she acquired skills to support herself. Defendant argues that none of these circumstances are present here.

Defendant offers no binding authority to support his proposition that because plaintiff possesses a degree and marketable skills, she is not entitled to alimony. This Court is not obligated to search for authority to support an argument raised on appeal. *Central Cartage Co v Fewless*, 232 Mich App 517, 529; 591 NW2d 422 (1998). Nonetheless, the trial court considered the required factors and the record supports the court's factual findings. The record supports the court's findings that defendant earns \$100,000 a year, that plaintiff was unemployed for almost a year and was unable to find employment, that she was receiving unemployment benefits but that the benefits expired a few months before the trial, and that her friends were helping her with day-to-day living expenses. The record also reveals that plaintiff had the \$18,400 she had received from defendant after the parties' first separation.

Given the trial court's findings of fact concerning plaintiff's needs and the parties' incomes, the trial court's award of alimony in the amount of \$150 a week for one year was just and reasonable under the circumstances. MCL 552.23; *Hanaway, supra* at 295. This determination is strengthened by the court's decision that the award was modifiable and subject to termination upon plaintiff obtaining employment.

Finally, we reject defendant's argument that the trial court abused its discretion by awarding plaintiff \$3,000 in attorney fees. *Gates v Gates*, 256 Mich App 420, 437-438; 664 NW2d 231 (2003). MCR 3.206(C) allows for the award of attorney fees provided that a party who requests attorney fees alleges "facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay." Attorney fees may also be awarded when a party has been forced to incur additional costs as a result of the other party's unreasonable conduct in the course of the action. *Hanaway, supra* at 298.

The record supports the trial court's findings that plaintiff was unable to finance this suit, that defendant was able to pay, and that plaintiff incurred additional costs as a result of defendant's unreasonable conduct. The trial court did not abuse its discretion in awarding plaintiff \$3,000 in attorney fees. *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997).

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra