

STATE OF MICHIGAN
COURT OF APPEALS

DIANA BIRRY,

Plaintiff-Appellee,

v

MUSTAPHA BIRRY,

Defendant-Appellant.

UNPUBLISHED

August 24, 2006

No. 256627

LC No. 01-142298-DM

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals following an order and judgment granting plaintiff a divorce and certain assets deemed part of the marital estate. We affirm in part and vacate in part.

I. Spousal Support and Bankruptcy

Defendant argues that the trial court erred in finding all amounts due plaintiff under the judgment are non-dischargeable in bankruptcy. Defendant also argues that the trial court erred in finding that all amounts awarded to plaintiff were deemed in the nature of support.

The trial court's determinations are conclusions of law, which this Court reviews de novo. *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005), citing *Kelly v Builders Square, Inc.*, 465 Mich 29, 34; 632 NW2d 912 (2001).

With regard to the court's finding that all amounts awarded to plaintiff are non-dischargeable in bankruptcy, the United States Supreme Court unanimously held that a Bankruptcy Court could look beyond evidence presented for a state court judgment (in a collection case) and was, therefore, not bound by the doctrine of res judicata. *Brown v Felsen*, 442 US 127, 138; 99 S Ct 2205; 60 L Ed 2d 767 (1979) (*superceded by statute on other grounds*). Therefore, to the extent a bankruptcy action is filed, only the Bankruptcy Court can determine whether any of defendant's debt to plaintiff is dischargeable in bankruptcy. The trial court erred to the extent it attempted to impose a ruling of non-dischargeability in some future bankruptcy action. Accordingly, we vacate this part of the judgment.

The trial court acted within its jurisdiction and authority, though, when it concluded that the amounts due plaintiff were in the nature of support. In *Krist v Krist*, 246 Mich App 59; 631 NW2d 53 (2001), this Court determined that an arbitrator in a divorce action did not exceed his authority when he conditioned monies not paid as required by the court to be deemed in the

nature of support. *Id.* at 65-66. The arbitrator barred all future support or alimony between the parties. *Id.* In *Krist*, the Court determined that the arbitrator was allowed to protect the lump sum award to plaintiff by attaching a condition to non-payment, i.e., money not paid would be considered “support.” *Id.*

In this case, the trial court awarded a lump sum to plaintiff. Like the arbitrator in *Krist*, the trial court barred all future support or alimony between the parties. Also, like the arbitrator in *Krist*, the trial judge here sought to protect the award from defendant’s ill-will toward plaintiff by attaching a consequence if the defendant did not pay pursuant to the court order. Similarly, we conclude that the trial court did not err in characterizing plaintiff’s award as support.

II. Child Support Order

Defendant argues that the trial court erred in imputing income to defendant but not imputing income to plaintiff in determining child support. This Court reviews child support orders for an abuse of discretion. *Burba v Burba*, 461 Mich. 637, 647; 610 NW2d 873 (2000).

A court’s decision to impute income must be based upon a party’s “actual ability and likelihood of earning the imputed income.” *Ghidotti v Barber*, 459 Mich 189, 199; 586 NW2d 883 (1998). “Moreover, the (child support formula) manual requires that the decision to impute income be based on the evaluation” of several factors, including prior employment experience, education level, the presence of children of the marriage in the party’s home and its impact on the earnings of the parties, availability of employment in the local geographical area, prevailing wage rates in the local geographical area, and special skills and training. *Id.*

In this case, the trial court articulated its reasons for not imputing income to plaintiff, noting the historic income disparity between the parties, adding: “[S]he has not worked during the marriage, has limited skills, an inability to read English and (has) young children in school. Her recent training at Melee Skin Care has not yet resulted in employment.” It was clear, too, that the minor children would be living with her. Given these facts, the court did not err in refusing to impute income to plaintiff.

Moreover, the record supports the amount of income imputed by the court to defendant. The court made specific findings concerning defendant’s income based on defendant’s W-2s as well as his own representations on loan origination documents. Because the courts findings regarding the parties’ income are not clearly erroneous, defendant fails to demonstrate any error requiring reversal or remand as it concerns the child support award.

III. Arizona Property & Business

Defendant argues that the court improperly determined ownership interests of third parties. Defendant also argues that the court discounted evidence proffered by the defendant regarding his ownership interests in the Arizona business and real property.

“In deciding a divorce action, the circuit court must make findings of fact and dispositional rulings. On appeal, the factual findings are to be upheld unless they are clearly erroneous.” *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993), citing *Beason v Beason*, 435 Mich 791; 460 NW2d 207 (1990). A dispositional ruling, too, “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).

This issue pertains to the trial court's jurisdiction over the alleged interests in property of third parties to the complaint. Here, plaintiff added Zayat and Hazime to her claim, pursuant to MCR 2.205(A), necessary joinder of parties, alleging that they had conspired to defraud the marital estate of the asset. Those defendants answered plaintiff's complaint and were present and represented by counsel at trial. In *Yedinak v Yedinak*, 383 Mich 409, 175 NW2d 706 (1970), the Court declared that: "[J]oinder of parties is appropriate in situations in which their respective rights and obligations arise out of the same contract, transaction, occurrence or like circumstances, and *any question of law or fact* is common to the claims of them all." *Id* at 416. [Emphasis added.] The question of fact common here was the ownership interests of defendant, Zayat, and Hazime. With respect to Zayat and Hazime, the court found neither had an interest in the business or the property. The court reasoned:

There was no written agreement evidencing Mr. Hazime's ownership interest in the business. His name was not included on the real estate deed, nor was it ever included in any bank documents, nor any corporate documents on file with the Arizona Corporations Commission. His name was never even identified on the corporate books and records of the company. The transaction was not recorded anywhere. The (business') accountant . . . testified that he never met Mr. Hazime. There was no indication on Mr. Hazime's tax return that he had an ownership interest in 24th Street Petro. He testified that Mona Zayat's tax return would reflect the interest. A review of her 1998-2001 tax returns indicates that it was not.

Mona Zayat testified that she has never been employed outside the home, knew nothing of the operations of the business and had never been to Arizona. Her testimony was conflicting. At her deposition, she said she was a shareholder; at trial she said she was not. She claims that she did not receive any salary or money from the gas station.

Thus, the court determined that Zayat and Hazime offered no credible evidence to show that either had an ownership interest in 24th Street Petro. In any event, Zayat and Hazime accepted the court's jurisdiction by answering plaintiff's complaint against them.¹ Further, this Court in *Reed v Reed*, 265 Mich App 131; 693 NW2d 825 (2005), determined that the trial court properly refused to "ignore reality when defendant obfuscates his various property holdings through a maze of real or nonexistent entities." *Id* at 158. Although the trial court determined that plaintiff had not proven that a conspiracy existed, the trial court nonetheless had the authority to determine "the extent of defendant's interest in various properties for the purpose of adjudicating a fair and equitable division of marital property." *Id*.

Therefore, the trial court did not err in determining the interests, if any, of Zayat and

¹ They admitted in their answer that they are residents of Wayne County.

Hazime when determining the extent of defendant's interests in the Arizona property and business. The trial court clearly had jurisdiction to determine defendant's interests. Zayat and Hazime, as third parties, are able to launch their own assault on the judgment below or upon defendant himself. This holding is consistent with the Court's determination in *Yedinak*: "If defendant's brothers have rights arising out of an alleged oral agreement by him to pay them, they have an adequate remedy at law to secure a judgment against him." *Yedinak, supra* at 414-415.

We next consider whether the trial court erred in the assessment of defendant's interest in the Arizona property and business and whether the court made an equitable disposition of those interests. In this case, the trial court determined that defendant owned 100 percent of the real property upon which defendant's corporation, 24th Street Petro, was located; and that defendant owned 70 percent of the corporation itself.

With respect to real property, the court made its determination based on several pieces of evidence, including the fact that title to the property remained in defendant's name since its purchase in 1998. The court also considered other documents presented to show his 100 percent ownership interest, including a financial statement submitted to GE Capital/Met Life, July 8, 1998, for a \$1.1 million loan to build 24th Street Petro, in which defendant indicated his net worth of \$590,000. Additionally, the credit authorization issued by Met Life indicated that the corporation was "owned 100 % by Mustapha" Birry. Given these factual determinations, the court did not make a clearly erroneous finding of fact.

With respect to the business, the court accepted Ahmed Birry and defendant's representation that Ahmed Birry owned 30 percent of the business, based upon testimony and upon a July 19, 2001, annual report filed with the Arizona Corporations Commission. Plaintiff on appeal does not contest nor cross appeal this finding. Nothing in the record indicates a clearly erroneous finding by the trial court. As such, with respect to both the real estate and business interest, this Court concludes that the trial court did not clearly err in its findings and determination of the extent of defendant's interests in 24th Street Petro or the real property on which it sits.

IV. Valuation of the Marital Estate

Defendant argues that the trial court erred in determining the value of the marital estate. The trial court's factual findings are reviewed for clear error. *Olson v Olson*, 256 Mich App. 619, 629; 671 NW2d 64 (2003). The findings are presumptively correct, and the burden is on the appellant to show clear error. A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been made. *Moore v Moore*, 242 Mich App 652, 654-655; 619 NW2d 723 (2000). If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts. *Sparks, supra*.

Defendant's appeal on these issues amounts to asking this Court to make determinations about the credibility of evidence, including testimony of certain witnesses, and to accept as fact defendant's purported un rebutted testimony with regard to the Lebanese condominium. "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, 430; 566 NW2d 642 (1997).

With regard to proceeds from defendant's sale of his interest in Pontiac Fuel, the trial court determined that defendant and Ajami agreed to the sale between January and July, 2001, but that defendant received the proceeds of the sale between December 10 and December 17, 2001 – the week plaintiff filed for divorce. The trial court determined:

It is evident that Mr. Ajami and (defendant) were not being truthful about the payment of the \$28,000. The fact that they agreed in December 2000 and January 2001 to terminate the business relationship was corroborated by the testimony of Mr. Bazzi and attorney Mohsin Mashhour. The existence of this transaction was not rebutted with sufficient evidence by (plaintiff). The court must accept that a transaction occurred nearly one year before the divorce action was filed.

The receipt of the \$28,000 is, however, an entirely separate issue. The court finds the testimony not credible on the issue of whether and when the payment was made. The \$28,000 payment for (defendant's) interest in Pontiac Fuel is a marital asset having been received during the parties' marriage. (Defendant's) claims that he spent the money on marital debt as it was received was not supported by any documentation or evidence. Therefore, this position is rejected.

Defendant argues that the burden of proving the money exists within the marital estate is upon plaintiff, citing *Kar v Hogan*, 399 Mich 529; 251 NW2d 77 (1976).

Under *Kar*, plaintiff here had the initial burden of production. *Id.* To satisfy that burden, plaintiff introduced into evidence various bank statements concerning defendant's accounts and checks written to defendant. The burden, under *Kar*, then shifted to defendant to prove his claim that the money was received and spent on marital debt before plaintiff filed for divorce. As noted above, the trial court determined that the evidence showed defendant received the \$28,000 the same week as the divorce. Taken together with defendant's failure to produce documentation to show disbursement to creditors, the court concluded that the money was part of the estate. The Supreme Court in *Kar* explained the results of insufficient rebuttal:

If the trier of fact finds the evidence by the defendant as rebuttal to be equally opposed by the presumption, then the defendant has failed to discharge his duty of producing sufficient rebuttal evidence and the "mandatory inference" remains unscathed. This does not mean that the ultimate burden of proof has shifted from plaintiff to defendant, but rather that plaintiff may satisfy the burden of persuasion with the use of the presumption, which remains as substantive evidence, and that the plaintiff will always satisfy the burden of persuasion when the defendant fails to offer sufficient rebuttal evidence. *Id.* at 542.

In this case, primarily because of defendant and his witnesses' lack of credibility, the trial court found defendant's testimony and proffered evidence regarding the sale and subsequent receipt of proceeds from his interest in Pontiac Fuel did not equally rebut plaintiff's evidence. As such, plaintiff's burden of persuasion was satisfied. Therefore, this Court affirms the trial court's finding.

With regard to the Lebanese condominium, defendant cites *Romano v South Range Constr. Co.*, 8 Mich App 533; 154 NW2d 560 (1967), for the proposition that an un rebutted

proffer of evidence conclusively establishes a fact. Defendant asserted that his testimony that the condominium was actually owned by his father was unrebutted by plaintiff and, therefore, must be accepted by the trial court as fact. There are several flaws with defendant's argument.

First, defendant offers absolutely no analysis of how *Romano* – a workers' compensation case – applies with regard to evidence here. Apparently, defendant is relying on *Romano* where it cites *Valente v Bourne Mills*, 77 R.I. 274; 75 A2d 191 (1950), a case from the Rhode Island Supreme Court. Both cases, though, are concerned with an inference that establishes a causal connection between a workplace accident and a subsequent injury, not the general establishment of fact by a party in a civil action. Neither case established a bright-line rule, as defendant here would like; and neither is binding upon this Court.

Second, defendant's testimony was rebutted – by plaintiff herself, who testified that the couple purchased the condominium in the late 1990s, using money from refinancing their marital home in Dearborn. Therefore, defendant's assertion on appeal that his trial testimony was unrebutted is patently false. The trial court, in its opinion following the trial, cited documentation in the form of land titles that showed defendant as the owner of the condominium – a fact that also rebuts defendant's assertion that he was not the true owner.

Third, Michigan's rules of evidence do not contain a requirement that a fact finder accept as fact any testimony, rebutted or unrebutted. Rather, MRE 402 applies – all relevant evidence is admissible. Based on these reasons, the trial court was in the best position to assess the credibility of the testimony and other evidence, accord it weight and determine that the property was indeed part of the marital estate. See *Draggoo, supra*.

Regarding the division of the marital estate, defendant on appeal asserts that the court made an inequitable division without finding that defendant committed "fault." This assertion appears to be based on one of the factors enumerated by our Supreme Court in *Sparks, supra*:

We hold that the following factors are to be considered wherever they are relevant to the circumstances of the particular case: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. *Id* at 159-160.

On appeal, defendant asserts that the trial court held some malice toward him because the opinion stated that defendant had "no intention of being honest" and "the court has little confidence that (defendant) will honor" his child support obligation. Defendant asserts on appeal that such characterizations were not based upon a specific finding by the trial court that he was at fault for the breakdown of the marriage.

The trial court did not determine defendant was at fault for destroying the marriage and did not make its division of assets based on fault. Rather, the trial court found that defendant on numerous occasions violated court orders, particularly the Status Quo order, by failing to make the prescribed child support, tax, and mortgage payments. The trial court mathematically calculated the amount he had refused to pay, \$27,123.07, and offset that amount from his one

half share of the equity in the marital home. Contrary to a finding of “fault,” the trial court simply fined him for failure to comply with its orders.

In the order, defendant received the Lebanese condominium, and the trial court offset its award of the annuity and IRAs to plaintiff against what she would have received from the proceeds of the sale of Pontiac Fuel and her interest in the condominium, i.e., defendant was able to retain 100 percent of the cash proceeds from the sale as well as 100 percent interest in the condominium. The trial court also awarded plaintiff half the equity of defendant’s interest in the Arizona real property, in the form of a \$100,000 lien. In making the division, the trial court cited *Byington v Byington*, 224 Mich App 103, 568 NW2d 141 (1997), explaining that the trial court need not address each factor in *Sparks* and may give them unequal weight. “The significance of each of these factors will vary from case to case, and each factor need not be given equal weight where the circumstances dictate otherwise.” *Id* at 115. After review of the extensive records in this case, particularly the conflicting testimony and evidence support each litigants position and the findings and conclusions reached by the trial court, we cannot conclude that defendant received less than a half interest in an asset only where he was fined for violating the court’s orders. As such, defendant’s argument fails.

Affirmed in part and vacated in part.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra