STATE OF MICHIGAN

COURT OF APPEALS

PETER RIEBSCHLEGER,

Plaintiff-Appellant,

v

SUSAN RIEBSCHLEGER, a.k.a. SUSAN O'ROURKE,

Defendant-Appellee.

UNPUBLISHED
February 21, 2008

No. 270226
Bay Circuit Court
LC No. 03-050207-DM

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiff (Peter) appeals as of right the trial court's divorce judgment following a bench trial. Peter argues that (1) the award of only 19% of the net marital estate to him, which estate included property purchased with income he earned prior to the marriage, was clearly erroneous; (2) the trial court erroneously imputed income to him without evidence that he intentionally decreased his income; and (3) the trial court erred in adjudicating the rights of third parties by ordering him to pay an unliquidated debt not yet adjudicated, and by ordering that real estate held by a trust could not be sold. We affirm in part, vacate in part, order the trial court to amend the divorce judgment, and remand.

The parties began living together in 1991 or 1992, and married in 1993. They had three children born in 1994, 1995 and April 2000. Around the birth of the third child, the parties began sleeping in separate bedrooms. Meanwhile, in 1995, Peter, an attorney, received a fee of over $400,000 as a result of a contingent fee agreement reached in 1991.

The complaint for divorce was filed in October 2003, and trial was held in 2005. The trial court found that Peter was the primary breadwinner and Susan was the primary caregiver for the children. The trial court ordered Peter to pay Susan spousal support of $236 per month for a year.

The trial court awarded the marital residence to Susan, finding it to be worth $153,500, and ordering Susan to pay taxes owed on the property of $5,135.60. The trial court found the value of Peter's law office property to be $209,000, and awarded it to him, ordering him to pay Dan Himmelspach (a tenant in common) $20,000, and to pay taxes owed on the property in the amount of $4,576.89. The trial court ordered that the parties' property on Higgins Lake be listed

for sale, with $20,000 of the proceeds going to Peter's attorney, $20,000 to Susan's attorney, and the balance divided equally between the parties.

The trial court awarded several vehicles to Peter, while Susan was awarded the vehicle in her possession. Numerous other items of tangible personal property were ordered to be sold at auction.

Peter's first argument on appeal is that the trial court's award of a smaller portion of the net marital estate to him was unsupported by the record and inequitable. In reviewing a trial court's division of the marital estate, this Court reviews the trial court's findings of fact for clear error. *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005). A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997), citing *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). This Court gives special deference to a trial court's findings when based on the credibility of the witnesses. *Draggoo, supra* at 429.

If the Court upholds the trial court's factual findings, it must decide if the property division was fair and equitable in light of the facts. *Sparks, supra* at 151-152; *Baker v Baker*, 268 Mich App 578, 582; 710 NW2d 555 (2005). A trial court's "ruling should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable." *Sparks, supra* at 152; *Baker, supra* at 582. "The dispositional ruling is discretionary and should be affirmed unless [we are] left with the firm conviction that the division was inequitable." *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); see also *Koy v Koy*, 274 Mich App 653, 660; 735 NW2d 665 (2007). The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). The division need not be mathematically equal, but any significant departure from congruence must be clearly explained by the trial court. *Id*. The trial court's disposition of marital property is intimately related to its findings of fact. *Id*.

Courts consider several factors when making a property division: (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. *Sparks, supra* at 159-160. MCL 552.19 provides: "Upon . . . a divorce . . . the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party by reason of the marriage . . . ."

The trial court first determines which assets owned by the parties are marital assets and which, if any, are separate assets. *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005). Generally, separate assets are not subject to division between divorcing parties. *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002).

Peter first challenges the trial court's valuation of the law office property, arguing that because he only owned an undivided ½ interest in the property, the law office property should

have been valued, at most, at $104,500, not $209,000. This argument lacks merit. The trial court found that the law office property was worth $209,000. There is a lack of evidence to leave this Court with a firm conviction that a mistake has been made. On the contrary, the trial court chose between the appraisals presented by two competing experts. Further, the trial court was not finding that Peter and Susan's undivided ½ interest in the property was worth $209,000. Rather, the trial court was merely valuing the property as a whole at $209,000. Both the opinion after trial and the divorce judgment clearly state the law office property to be valued at $209,000, never stating that Peter and Susan's undivided ½ interest is worth that amount.

Next, Peter argues that the trial court failed to distinguish between marital property and separate property. Peter argues that his retirement plan was separate property. However, the trial court awarded Peter's retirement plan to him. Therefore, there can be no error.

Next, Peter argues that his approximately $400,000 attorney fee was separate property. This argument lacks merit. Documentary evidence shows that Peter received that fee in February 1995, during the marriage. Therefore, the trial court's implied finding that the attorney's fee was marital property was not clearly erroneous. Moreover, Peter offers no proof that the work that earned the fee was done prior to the marriage. Indeed, Peter's attorney admitted at trial that Peter worked on the case in the early part of the marriage.

Peter next argues that the trial court failed to make specific findings of fact regarding the amount of marital debt, and abused its discretion in "awarding" all marital debt to him. The trial court did not err in failing to make specific findings of fact regarding the amount of marital debt. In the judgment, the trial court listed 23 debts, including the party to whom the debt was owed and the amount. Therefore, the trial court did not fail to make findings of fact regarding the amount of debts.

Peter argues that the trial court abused its discretion in imposing all of the debt on him, with the exception of the debt owed on the marital home. Since the debt at issue encumbered the property ultimately divided by the trial court, we again consider whether the trial court's findings of fact were clearly erroneous, *Pickering*, *supra* at 7, and whether, if we uphold the trial court's factual findings, the property division was fair and equitable in light of the facts. *Koy*, *supra* at 660. Applying these standards of review, we conclude that Peter's argument lacks merit.

While Peter argues that he was not awarded assets from which to pay the debts, this is not the case. The trial court awarded numerous pieces of property to Peter, including the law office property (which Peter admits is worth at least $104,500), the Ford Mustang, the law firm itself, and his retirement accounts. We find that in light of all the circumstances, the trial court's division of debt was equitable.

Peter requests that this Court reverse the trial court's denial of his request, in his motion for new trial, that the proceeds of the sale of the Higgins Lake property be used to pay the property taxes. Susan agrees that the taxes paid by Plaintiff, post-judgment, should be reimbursed upon the sale of the property. Accordingly, since Susan concedes error, this Court orders the trial court to amend the judgment to provide that the proceeds of the sale of the Higgins Lake property should be used to repay Peter for taxes he paid, post-judgment, on that property (before dividing the proceeds equally).

Peter next argues that the trial court abused its discretion in ordering the sale at auction of numerous items of personal property, where the parties stipulated to a division of some of the property. Susan does not address this issue in her brief. This argument has merit.

Stipulations of fact are binding. *Gates v Gates*, 256 Mich App 420, 426; 664 NW2d 231 (2003). Stipulations of law are not. *Id*. Here, the alleged stipulation was that numerous items of property were the separate property of Peter or Susan. This was a stipulation of fact and not of law. Because the parties do appear to have stipulated that numerous items of tangible personal property were separate property, as indicated in Susan's exhibit 12 below, the trial court abused its discretion in ordering the sale by auction of such items. Therefore, we vacate that portion of the trial court's order requiring the sale by auction of all items of tangible personal property, and remand for a determination of which items the parties stipulated to be separate property.

Peter finally argues that the overall property settlement is inequitable. We disagree.

Using the factors enumerated above from *Sparks*, the trial court made the following findings: (1) the duration of the marriage was about ten years; (2) the contributions to the marital estate were almost exclusively by Peter; (3) Peter is 52 and Susan's age was not evidenced at trial; (4) the parties are both healthy; (5) the life status of the parties is that they did not live beyond their means; (6) the "necessities and circumstances" are that following separation, Susan continued to live in the marital home, while Peter resided above his law office; (7) Peter is capable of earning $40,000 to $45,000 per year, while Susan was a stay-at-home mom who now has nominal income from music; (8) "past relations and conduct" included that Susan engaged in an extra-marital affair while Peter was "not totally free of fault and his conduct may have brought about the extra-marital affair."

Peter contends that the trial court's finding that his conduct may have brought about Susan's extra-marital affair is unsupported by evidence in the record. Peter does not expressly argue that that finding is clearly erroneous. This Court is not obliged to make Peter's argument for him. "A party may not rely on this Court to make his arguments for him." *Rorke v Savoy Energy, LP*, 260 Mich App 251, 260; 677 NW2d 45 (2003). Because Peter does not argue that any findings by the trial court are clearly erroneous, we find no basis to disregard the trial court's findings or the overall property division based on those findings.

Next, Peter argues that the trial court erroneously imputed income to him without evidence that he intentionally reduced his income. We disagree.

This Court reviews an award of alimony de novo. *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991). This Court will not modify the trial court's order unless it is convinced that, sitting in the position of the trial court, it would have reached a different result. *Demman v Demman*, 195 Mich App 109, 110-111; 489 NW2d 161 (1992). The burden is on the appellant to persuade this Court that a mistake was made. *Thames, supra* at 308. However, this Court must accept the trial court's factual findings unless they are clearly erroneous. *Moore v Moore*, 242 Mich App 652, 654-655; 619 NW2d 723 (2000). A finding is clearly erroneous where the appellate court is left with a definite and firm conviction that a mistake has been made. *Moore, supra* at 654-655.

Under Michigan law, a trial court has considerable discretion to award alimony "as it considers just and reasonable" in light of the circumstances. MCLA 552.23. The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party, and alimony is to be based on what is just and reasonable under the circumstances. *Moore, supra* at 654; *Magee v Magee,* 218 Mich App 158, 162; 553 NW2d 363 (1996). In making an equitable decision about alimony, the factors to be considered by the trial court 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 abilities 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) a party's fault in causing the divorce; (13) the effect of cohabitation on a party's financial status; and (14) general principles of equity. *Olson v Olson,* 256 Mich App 619, 631; 671 NW2d 64 (2003); *Hatcher v Hatcher,* 129 Mich App 753, 760; 343 NW2d 498 (1983).

The voluntary reduction of income may be considered in determining the proper amount of alimony. *Moore, supra* at 655. If a court finds that a party has voluntarily reduced his or her income, the court may impute additional income in order to arrive at an appropriate alimony award. *Id*.

Here, the trial court found that Peter had income earning capacity of $40,000 to $45,000. There was testimony that in 2004 Peter had net income of $41,177. Therefore, the trial court's finding is not clearly erroneous. Accordingly, the trial court did not "impute" income to Peter or make a finding that he voluntarily reduced his income. Rather, the trial court made a finding of fact regarding Peter's income earning capacity. Peter's claim must therefore fail, and the trial court's alimony award is affirmed.

Next, Peter argues that the trial court erred in adjudicating the rights of third parties when it ordered him to pay $20,000 to Himmelspach, and ordered that the Schemm property held by a trust could not be sold. We agree. A challenge to the subject-matter jurisdiction of a trial court is reviewed de novo. *Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Twp,* 237 Mich App 721, 730; 605 NW2d 18 (1999).

A court lacks jurisdiction in a divorce case "to compel a party to convey property or a property interest to a third person, even a child of the parties, or to adjudicate claims of third parties." *Reed, supra* at 158 (internal quotation marks and citations omitted). The court's jurisdiction is limited to the dissolution of the marriage and ancillary matters such as child support, spousal support, division of marital assets, and the award to one spouse of the other spouse's property in certain circumstances. *Id*.

Peter first argues that the trial court lacked jurisdiction to order him to pay an unliquidated $20,000 debt to Himmelspach. This argument has merit. A court lacks jurisdiction in a divorce case to compel a party to convey property or a property interest to a third person, or to adjudicate claims of third parties. *Reed, supra* at 158. As a matter of law, the trial court lacked jurisdiction to adjudicate Himmelspach's claim that Peter owed him $20,000.

Peter next argues that the trial court lacked jurisdiction to order that the Schemm street property be awarded to the children. This argument has merit. The divorce judgment states that the Schemm street property "has been placed in Trust for the children of the parties. Both parties wish to have said property continue in Trust for the children. Therefore, the children are hereby awarded said property." A court lacks jurisdiction in a divorce case to compel a party to convey property or a property interest to a third person, even a child of the parties, or to adjudicate claims of third parties. *Reed, supra* at 158. Accordingly, as a matter of law, under *Reed*, the trial court could not award the Schemm street property to the children.

It is axiomatic that when property is placed in a trust, the trustees have legal title and the beneficiaries have equitable title. "The separation of legal and equitable title is one of the distinctive features of the trust relationship. Legal title vests in the trustee to be held for the benefit of the beneficiary." *Apollinari v Johnson*, 104 Mich App 673, 675; 305 NW2d 565 (1981), citing *Stephens v Detroit Trust Co*, 284 Mich 149, 157-158; 278 NW 799 (1938). Here, there is no evidence that either party is a trustee of the trust. Thus, neither party has legal title of the Schemm street property. Accordingly, the Schemm street property is no longer marital property.

On the basis of the foregoing, we vacate the portion of the divorce judgment containing the following two sentences: "Both parties wish to have said property continue in Trust for the children. Therefore, the children are hereby awarded said property." We further direct that the following provision is to be substituted: "Therefore, the Schemm street property is no longer marital property."

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder