

STATE OF MICHIGAN  
COURT OF APPEALS

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MICHELLE MCVOY KETTLEWELL,

Plaintiff/Counter-Defendant-  
Appellant,

v

JAMES B. KETTLEWELL,

Defendant/Counter-Plaintiff-  
Appellee.

UNPUBLISHED

April 15, 2008

No. 275028

Kent Circuit Court

LC No. 05-002613-DM

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Before: Fitzgerald, P.J., and Smolenski and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's judgment of divorce, entered on October 25, 2006. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I

Plaintiff first argues that the trial court's determination of spousal support was inequitable. According to plaintiff, the trial court failed to balance the needs and equities of the parties in a way that would prevent her from becoming impoverished without invading her marital assets. We agree.

We review a trial court's award of spousal support for an abuse of discretion. *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003). An abuse of discretion occurs when the trial court's decision falls outside of the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). We review a trial court's findings of fact related to spousal support for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). "A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made." *Id.* at 654-655. If there is no clear error, we determine whether the dispositional ruling was fair and equitable in light of the facts. *Id.* at 655.

The main objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party. *Id.* at 654. Support is to be based on what is just and reasonable under the circumstances of the case. *Id.* The trial court should consider: (1) the

relations and conduct of the parties during the marriage; (2) the length of the marriage; (3) the parties' ability to work; (4) the distribution of property awarded to the parties; (5) the parties' ages; (6) the abilities of the parties to pay support; (7) the present situation of the parties; (8) the parties' needs; (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, supra* at 631. When determining spousal support, the trial court "should focus on the income-earning potential of the assets and should not evaluate a party's ability to provide self-support by including in the amount available for support the value of the assets themselves." *Hanaway v Hanaway*, 208 Mich App 278, 296; 527 NW2d 792 (1995).

In this case, the trial court took into account all of the factors listed in *Olson, supra*. The parties were married in 1990. The court found that both parties contributed to the marriage, defendant as a "breadwinner" and plaintiff as a "contributing homemaker," and awarded each of them 50 percent of the marital estate. The court analyzed the past conduct of the parties, specifically noting plaintiff's controlled substance abuse. The court also noted that both parties had suffered health problems. Next, the court determined that both parties could work. It recognized, however, that plaintiff was not currently working because of substance abuse treatment and that, when she became employed, there would be a large disparity in the incomes of the parties. The court determined that plaintiff had a present need, but did not specify the extent of that need, and that defendant had the ability to pay spousal support. Defendant earned a base salary of \$125,000, plus bonuses and rental income, and was still employed in the capacity he had been employed throughout the marriage. On the other hand, plaintiff lacked a post-secondary degree and had not worked full-time since 1992. The court further noted that the parties previously enjoyed a "middle class" lifestyle and that defendant "will be having to care for the two children until they reach the age of majority." Finally, the court found that plaintiff was at fault for the divorce because of her controlled substance abuse.

While the trial court appeared to take the appropriate factors into account, we find that it abused its discretion by awarding plaintiff insufficient spousal support to prevent her from invading her marital assets to support herself. The court did not balance the needs and incomes of the parties without impoverishing plaintiff. The court specifically recognized that the parties previously enjoyed a "middle class" standard of living; that plaintiff needed spousal support and would not be able to avoid a "wide disparity in incomes" without it; and that defendant was able to pay spousal support. However, the court only awarded spousal support in the amount of \$1,000 per month (\$12,000 per year), for 60 months (five years). In contrast, defendant's base salary was approximately \$125,000 per year. Thus, not only does the court's award of spousal support result in a disparity between the incomes and lifestyles of the parties, but it is unlikely that plaintiff, without a post-secondary degree or significant work experience, will be able to maintain a "middle class" standard of living on \$12,000 per year without immediately invading her marital assets, contrary to our mandate in *Hanaway, supra*. Further, it is unlikely that plaintiff, who will be over the age of 50, will be able to maintain even a modest lifestyle after five years, when defendant no longer provides spousal support. While the court found plaintiff responsible for the breakdown of the marriage, fault is only one of the relevant factors in determining spousal support, and, "a judge's role is to achieve equity, not to 'punish' one of the parties." *Sands v Sands*, 442 Mich 30, 36-37; 497 NW2d 493 (1993). We conclude that the trial

court's award of spousal support did not balance the needs and equities of the parties in a manner that prevents plaintiff from becoming impoverished. On remand, the trial court should reconsider the award of spousal support, keeping the ultimate objective in mind.

Additionally, plaintiff argues that the trial court clearly erred in stating that the parties' children would reside with defendant until they reached the age of majority. Considering that the settlement did not indicate that the children would reside with defendant until the age of majority, the trial court's statement to that effect was clearly erroneous. Nevertheless, we find that the error was harmless. *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994). In the event that plaintiff obtains joint physical custody of the children as contemplated by the settlement, defendant will be required to pay child support, an event that the trial court specifically indicated would make the spousal support award modifiable. Thus, at the point in time when plaintiff has joint custody of the children, she may move the trial court to amend the spousal support award, and rectify the trial court's factual error.

## II

Plaintiff next argues that she is entitled to share in the appreciation of the rental property defendant purchased in Massachusetts before the parties' marriage. We agree. In reviewing a dispositional ruling, we review the trial court's findings of fact for clear error and then decide whether the ruling was fair and equitable. *Moore, supra* at 654-655.

A trial court's first consideration when dividing property in a divorce proceeding is the determination of marital and separate assets. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). "Generally, the marital estate is divided between the parties, and each party takes away from the marriage that party's own separate estate with no invasion by the other party." *Id.* at 494. There are, however, two statutorily-created exceptions to the doctrine of noninvasion of separate estates. One of the exceptions is found in MCL 552.401, which provides that one spouse's separate estate can be invaded if the other spouse "contributed to the acquisition, improvement, or accumulation of the property." Under this exception, when one spouse significantly assists in the acquisition or growth of the other spouse's separate asset, "the court may consider the contribution as having a distinct value deserving of compensation." *Id.* at 495. However, a premarital asset that increases in value by "wholly passive" appreciation, rather than additional capital or active management, should not be included in the marital estate. *Dart v Dart*, 460 Mich 573, 585 n 6; 597 NW2d 82 (1999); *McNamara v Horner*, 249 Mich App 177, 184; 642 NW2d 385 (2002); *Reeves, supra* at 496-497.

In *Hanaway, supra*, the defendant's father gifted stock in the family business to the defendant. *Id.* at 281, 283. This Court found that because the plaintiff managed the household and cared for the parties' children, enabling the defendant to invest long hours and efforts in the family business, the defendant's stock in the business was a marital asset, rather than separate property. *Id.* at 293-294. The Court concluded that the business "appreciated because of defendant's efforts, facilitated by plaintiff's activities at home." *Id.* at 294. In *Reeves, supra*, the defendant purchased two rental properties before the parties married. *Id.* at 492. During their four-year marriage, the plaintiff worked sporadically and managed the household. *Id.* at 492-493. This Court found that the plaintiff was entitled to a share in the appreciation of the rental properties that accrued during the marriage because the properties were actively managed by the defendant during the marriage. *Id.* at 496-497. However, the *Reeves* Court found that the

appreciation of the defendant's one-sixth interest in a shopping center was "wholly passive at all times." *Id.* at 492, 497. The shopping center did not appreciate because of the defendant's efforts, facilitated by the plaintiff's activities at home. *Id.* at 497. Accordingly, this Court excluded the defendant's appreciated interest in the shopping center from the marital estate. *Id.*

In this case, the trial court excluded the Massachusetts rental property, including its appreciation, from the marital estate because defendant acquired it before the parties' marriage, defendant testified that it was self-sustaining, and plaintiff did not present sufficient evidence to warrant invasion of the asset. We disagree with the trial court's conclusion. It is undisputed that defendant purchased the property before the parties' marriage and defendant testified that for most of their marriage the property was self-sustaining, meaning that he paid the mortgage and other bills associated with the property with rental income. Since 2003, however, defendant has invested approximately \$800 per month of his regular earnings into the property. Although defendant does not spend a substantial amount of time managing the property, he pays the bills and occasionally coordinates maintenance for the property. Considering this evidence, the appreciation of the Massachusetts property cannot be deemed "wholly passive." Because plaintiff contributed to the parties' marriage by managing the household and caring for their children, she is entitled to 50 percent of the appreciation of the Massachusetts property that accrued during the marriage. *Reeves, supra; Hanaway, supra.* On remand, the trial court should determine how much the property appreciated during the parties' marriage and award plaintiff 50 percent of the appreciation value.

### III

Next, plaintiff challenges the trial court's denial of her request for attorney fees. We disagree. We review a trial court's decision whether to award attorney fees for an abuse of discretion. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999).

A party in a domestic relations matter may recover reasonable attorney fees if she is unable to bear the expense of attorney fees and the other party is able to pay. *Id.*; MCR 3.206(C). "A party may not be required to invade her assets to satisfy attorney fees when she is relying on the same assets for her support." *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). Attorney fees also may be authorized when the party requesting them has been forced to incur expenses as a result of unreasonable conduct during the divorce proceedings. MCR 3.206(C); *Hanaway, supra* at 298.

In this case, regardless whether plaintiff could have obtained attorney fees, the parties' settlement clearly established that each party would pay its own attorney fees. In placing their property settlement on the record, plaintiff's trial counsel specifically stated that each party was "going to pay their own attorney's fees." Plaintiff thereafter made no showing that defendant forced her to incur unreasonable expenses as a result of his conduct. Because the parties placed the settlement on the record in open court, their attorney fee agreement is binding. An attorney fee agreement is treated the same as a property settlement. See *Chisnell v Chisnell*, 149 Mich App 224, 234; 385 NW2d 758 (1986). Property settlements in a judgment of divorce are final and may not be modified absent a showing of fraud, duress, or mutual mistake. *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999). A property settlement can be final, even before the judgment of divorce is entered, if it is made in open court. MCR 2.507(G). Moreover, "[a] party who expressly agrees with an issue in the trial court cannot then take a contrary position on

appeal.” *Grant v AAA Michigan/Wisconsin, Inc, (On Remand)*, 272 Mich App 142, 148-149; 724 NW2d 498 (2006).

#### IV

Finally, plaintiff argues that the trial court abused its discretion by prohibiting her from presenting evidence of alleged fraud during trial. We disagree. We review a trial court’s ruling regarding the admission of evidence for an abuse of discretion. *Hottmann v Hottmann*, 226 Mich App 171, 177; 572 NW2d 259 (1997). Here, all matters were settled before trial, except spousal support, the ownership of an automobile, and the determination regarding the Massachusetts property. The fraud allegations raised by plaintiff related to financial transactions and other assets that were not at issue at trial. Therefore, the evidence was irrelevant. Further, plaintiff was allowed to fully explore issues regarding fraud, misrepresentation, and concealment in the June 2006 hearing on her motion to vacate the settlement, and in any other post-trial motion she wished to file. The trial court specifically stated on the record that issues involving fraud would be open for post-judgment motions or hearings. While the trial court denied plaintiff’s motion to vacate the settlement, it invited her to return to the fraud issue if she could provide concrete data to explain how she was defrauded and how she was harmed by defendant’s alleged fraud. Therefore, plaintiff was never prevented from introducing relevant evidence.

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

/s/ E. Thomas Fitzgerald  
/s/ Michael R. Smolenski  
/s/ Jane M. Beckering