

STATE OF MICHIGAN
COURT OF APPEALS

MAX JAMES RIEKSE,

Plaintiff/Counter-Defendant-
Appellant,

v

NELLY EVGENY RIEKSE,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

January 2, 2014

No. 312341

Muskegon Circuit Court

LC No. 09-245026-DM

Before: WHITBECK, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Plaintiff, Max James Riekse, appeals as of right from the trial court's order of separate maintenance. The order divided the parties' marital property, granted defendant, Nelly Evgeny Riekse, \$150,000 in separate marital property, and awarded Nelly Riekse spousal support of \$3,250 a month for ten years. We affirm.

I. FACTS

A. BACKGROUND FACTS

The parties testified that they met in Moscow in March 2000 after Max Riekse placed an advertisement in a Russian paper, to which Nelly Riekse responded. The parties became engaged and exchanged letters. Nelly Riekse moved to the United States in February 2001, at which point she did not speak English. The parties married in May 2001.

Max Riekse testified that he served in Iraq from December 2002 to April 2004. Max Riekse testified that while he was in Iraq, his relationship with Nelly Riekse suffered because she would "vent her anger and frustration" at him and, when he returned from Iraq, she refused to engage in marital relations with him and engaged in domestic violence. Nelly Riekse testified that when Max Riekse returned from Iraq, he was different and angry, and he engaged in domestic violence and became verbally abusive. Max Riekse testified that his anger did not get out of control during the marriage and that, when he put holes in the walls instead of hitting Nelly Riekse, it showed that he had control.

Max Riekse testified that the parties had agreed to have several children. Nelly Riekse testified that the parties agreed to have two children. The parties had one mutual child in 2002.

Max Riekse testified that he strongly desired to have more children. Nelly Riekse testified that she did not want to have more children with Max Riekse because of his demeanor and because she was concerned about the health implications of having more children at their respective ages. Nelly Riekse testified that when she raised her concerns to Max Riekse, he told her that they could “reject” a child that might be born with health problems.

Max Riekse filed for divorce in December 2009.

B. TESTIMONY CONCERNING THE PARTIES

At the time of trial, Max Riekse was 64 years old and Nelly Riekse was 47 years old. Max Riekse has a Bachelor’s degree and two Master’s degrees, served in the military for 32 years, and taught public school for 17 years. Nelly Riekse has completed high school and college in Russia, and is an artist with a background in portraits and landscapes. Before moving to the United States, Nelly Riekse worked for a television station in Moscow, doing stage makeup. Since moving to the United States, Nelly Riekse has not worked outside the home. According to Nelly Riekse, Max Riekse did not want her to work outside the home but instead wanted her to work in the home and have children. Max Riekse testified that he encouraged Nelly Riekse to work outside the home during the marriage.

C. ASSETS

Max Riekse testified that he was the beneficiary and trustee of a trust account (the family trust) that his parents established in 1994. The value of Max Riekse’s family trust account was \$689,671 in January 2010. Max Riekse testified that he used the family trust account to pay for attorney fees, taxes, and major expenses on the marital home. Max Riekse also testified that he was also the trustee of a trust that his parents had established for their grandchildren (the grandchildren trust), which he used for the benefit of the parties’ son, Richard, that was worth \$208,405.

Max Riekse testified that he started building a home in 1994 on land that he had purchased, and that this became the parties’ marital home. The house was worth \$122,400 in 2001. Max Riekse testified that the home was 80 to 85 percent complete when Nelly Riekse arrived. Nelly Riekse testified that when she arrived, the home was incomplete and very messy. Nelly Riekse testified that she helped build additions to the home, including by doing cement work, painting, repairs, and gardening.

Max Riekse testified that he used money from his family trust to pay off the mortgage on the home. Max Riekse testified that he paid off the flexible line of credit on the house in 2009, but that he could not remember how much he paid. Max Riekse testified that he did not pay the line of credit off from the family trust.

Nelly Riekse testified that, at the time of trial, her income was \$600 a month in social security spousal benefits and \$300 a month in social security from the parties’ son. Nelly Riekse testified that her limited proficiency with English made it difficult for her to obtain a job. A

family friend testified that Nelly Riekse had limited English skills and could “barely” read English. Nelly Riekse was attempting to finish illustrating a children’s book and had sold a couple small paintings to friends. During the pendency of the divorce, Nelly Riekse also submitted an entry to Art Prize in Grand Rapids, which she hoped might lead to an “invitation” to do other artwork. Nelly Riekse testified that her monthly budget was about \$3,500 a month, which included \$500 a month for savings. Nelly Riekse testified that her food was expensive because she had been diagnosed with cancer.

Max Riekse testified that he received \$3,041 in military benefits, \$2,932 in Veterans Affairs benefits, \$1,080 in social security, and \$943 in pension monthly. Max Riekse testified that he also received about \$10,000 to \$20,000 a year from the interest on his family trust.

Nelly Riekse testified that she understood that the equity value of the home was about \$214,000, on the basis of two bank appraisals. Max Riekse testified that the fair market value of the home was \$175,000 and that an appraiser found that the home was worth \$177,000 to \$178,000 two years before trial. Max Riekse testified that the township valued the home at \$260,000, but that he thought that the home might only be worth \$150,000.

Nelly Riekse testified that her parents owned a small apartment in Moscow and a country home for summer use. Max Riekse testified that he believed that Nelly Riekse would inherit two or three million dollars from her parents; Nelly Riekse denied that she would receive a large inheritance.

Max Riekse testified that he had back and stomach problems since he returned from Iraq, and suffered from high blood pressure and heart disease. At the time of trial, Nelly Riekse had had been recently diagnosed with cancer that had metastasized to her lymph nodes. In Nelly Riekse’s final trial statement, she stated that she had confirmed stage 3 colorectal cancer that had metastasized to her lymph nodes and was being treated aggressively. Nelly Riekse testified that she would require additional surgeries.

Nelly Riekse requested \$250,000 from Max Riekse’s trust fund to purchase a home with a yard and an art room. Max Riekse offered to purchase Nelly Riekse a house near his house and allow her to live in it rent-free for 10 years, but Nelly Riekse testified that she did not want to live in that location.

D. TRIAL COURT’S OPINION AND ORDER

The trial court found that Max Riekse was “exceptionally industrious” and was dedicated to high goals. It found that Nelly Riekse is an artist trained in painting, illustration, and sculpture, but that she has a limited English speaking proficiency. It found that, during the parties’ marriage, Nelly Riekse cared for the parties’ son, finished the partially completed marital home, and completed extensive landscaping. The trial court found that Max Riekse forbade Nelly Riekse from working during the marriage. It found that when Max Riekse returned from Iraq, he was irritable and angry, had a short temper, and bruised Nelly Riekse during one incident.

The trial court found that Max Riekse had a strong desire to have more children that Nelly Riekse did not share. The trial court found that Max Riekse had advertised for a surrogate

mother or egg donor during the marriage. It found that Nelly Riekse did not want to have more children with Max Riekse because he did not support his illegitimate child and because his behavior changed after he returned from Iraq.

On the basis of two home appraisals and the 2010 tax assessment of the home, the trial court found that the value of the home was \$213,500. The trial court found that the value of the home was \$122,400 before the marriage. Thus, the trial court found that the marital home increased in value \$91,100 during the marriage, and awarded the parties each \$45,550. After extensive findings on the spousal support factors, the trial court also awarded Nelly Riekse modifiable spousal support of \$3,250 a month for ten years.

The trial court also found that Max Riekse was the beneficiary of the family trust, which was the equivalent of an inheritance. It found that Max Riekse kept the family trust separate from the parties' marital assets, and used the income from the trust for marital purposes, but that the family trust was Max Riekse's separate property. The trial court additionally found that it needed to utilize the assets of the family trust to meet Nelly Riekse's needs because the marital estate was "insufficient to do so." The trial court ordered Max Riekse to pay Nelly Riekse \$150,000 and \$15,000 for a vehicle. The trial court's written order simply states that Max Riekse would pay Nelly Riekse \$150,000 and that, "[i]f said transfer is made from Plaintiff's Trust, the parties shall seek professional tax advice"

II. PROPERTY DIVISION

A. STANDARD OF REVIEW

When reviewing a judgment of divorce, this Court reviews the trial court's factual findings for clear error, then determines "whether the dispositive ruling was fair and equitable in light of those facts."¹ The trial court's factual findings are clearly erroneous if, after considering all of the evidence, we are definitely and firmly convinced that the trial court made a mistake.² We should affirm the trial court's dispositive ruling unless we are definitely and firmly convinced that the property division was inequitable.³

B. LEGAL STANDARDS

The trial court's primary objective in a divorce proceeding is to "arrive at a property settlement that is fair and equitable in light of *all* the circumstances."⁴ When dividing the parties' property, the trial court should consider the following factors:

¹ *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

² *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990).

³ *Sparks*, 440 Mich at 152.

⁴ *Boonstra v Boonstra*, 209 Mich App 558, 563; 531 NW2d 777 (1995).

(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.^[5]

C. DIVISION OF PROPERTY

Max Riekse contends that it was inequitable for the trial court to require him to pay Nelly Riekse a total of \$210,000 because (1) Max Riekse contributed more to the marital estate than did Nelly Riekse, (2) the trial court erroneously valued the parties' marital house too high, (3) the trial court did not award Max Riekse a credit for paying off the parties' home equity line of credit, (4) the trial court inequitably divided the parties' personal property, and (5) the trial court erroneously invaded Max Riekse's separate property. We will address each argument in turn.

1. CONTRIBUTIONS TO THE MARITAL ESTATE

Max Riekse asserts that the trial court erred in dividing the parties' marital property because he contributed more to the marital estate than did Nelly Riekse. We disagree.

Contributions to the parties' marital estate may include contributions to the parties' home and family life.⁶ Here, the trial court found that both parties contributed to the marital estate through hard work—Max Riekse in his careers, and Nelly Riekse in the home. The parties both testified regarding Nelly Riekse's contributions to the marital home, including her extensive work on the house itself and care for the parties' child. Thus, even though Max Riekse was the sole *financial* contributor to the marital estate, the trial court's finding that both parties contributed to the marital estate was not clearly erroneous.

2. VALUE OF THE MARITAL HOME

Max Riekse also contends that the trial court erred by awarding Nelly Riekse about \$45,000 as her half of the equity in the marital home. We disagree.

When faced with widely divergent valuations of marital property, “the trial court has great latitude in arriving at a final figure.”⁷ Generally the trial court does not clearly err when its “valuation of a marital asset is within the range established by the proofs[.]”⁸

We conclude that the trial court's determination that the marital home was worth \$213,500 was not clearly erroneous. Nelly Riekse testified that, on the basis of two appraisals of the marital home, the home was worth \$214,000. Thus, while the appraisals themselves were not

⁵ *Sparks*, 440 Mich at 159-160.

⁶ See *Hanaway v Hanaway*, 208 Mich App 278, 293-294; 527 NW2d 792 (1995).

⁷ *Pelton v Pelton*, 167 Mich App 22, 26; 421 NW2d 560 (1988).

⁸ *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

admitted into evidence, the trial court had a sufficient basis from which to conclude that the average of the appraisals was about \$213,500, even if the trial court erred by mentioning the names of those appraisals when they were not specifically entered into evidence. Additionally, while Max Riekse testified that he believed that the home was worth \$177,000 or \$150,000, Max Riekse also admitted that the township had assessed the home at \$260,000.

We conclude that the trial court did not clearly err by awarding Nelly Riekse \$45,550 as half the value of the increase in equity of the marital home because its finding regarding the value of the marital home was within the range established by the proofs.

3. HOME EQUITY CREDIT

Max Riekse contends that he should have received a credit for paying off the parties' home equity line of credit from his trust account. However, at trial, Max Riekse testified that he did not pay off this line of credit from the family trust account. Max Riekse also did not present evidence on the amount that he paid. Given these facts, we conclude that the trial court did not err by failing to credit Max Riekse for payment on the parties' home equity line of credit during the pendency of the divorce.

4. DISTRIBUTION OF PERSONAL PROPERTY

On appeal, Max Riekse contends that Nelly Riekse received a disproportionate amount of personal property. However, at trial, Max Riekse testified that he was satisfied with the parties' division of personal property. A party may not take a position on appeal contrary to his or her position before the trial court.⁹ We conclude that the trial court did not err by ordering each party to keep the personal property in his or her possession.

5. INVASION OF SEPARATE ASSETS

Max Riekse contends that the trial court erred by invading his separate property because Nelly Riekse did not sufficiently demonstrate that the trial court needed to do so. We disagree.

As an initial matter, we note that Max Riekse contends that the trial court erred by ordering invasion of *both* trusts because the grandchildren trust was the benefit of third parties, the grandchildren of Max Riekse's parents. Here, the trial court opined:

Before and during the marriage [Max Riekse] became the beneficiary of a trust created for his benefit by his parents. The Court finds that the trust is akin to an inheritance that was kept separate from marital assets, and is not a marital asset to be divided between the parties. That being said, it appears that [Max Riekse] may have used income from his trust for marital purposes, which would potentially lead to consideration of his trust assets as marital property. In this case, as explained below, *the Court is utilizing [Max Riekse's] assets to meet the*

⁹ *Hilgendorf v St. John Hosp & Med Ctr Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001).

needs of the Defendant. [Max Riekse's] parents also established a grandchildren's trust, and the Court finds that that trust [is] not a marital asset.

Read carefully, it is clear that the trial court, when it referred to "a trust created for his benefit by his parents," was referring to the family trust, as his parents created the grandchildren trust for their *grandchildren*, not Max Riekse. In its opinion, the trial court subsequently found that it was "necessary to invade [Max Riekse's] individual assets . . ." The trial court ordered that Max Riekse would pay Nelly Riekse "the sum of \$150,000. If said transfer is made from [the family trust], the parties shall seek professional tax assistance to minimize any tax burden for either."

We conclude that the trial court did not impermissibly order an invasion of the grandchildren's trust, which was third-party property. Again, a fair reading of the trial court's order does not order or allow invasion of the grandchildren trust, it simply orders Max Riekse to pay Nelly Riekse \$150,000. Additionally, it is clear from the trial court's opinion preceding the order that only Max Riekse's "inheritance" trust could be invaded, not the grandchildren's trust. Thus, we do not agree that the trial court's ruling is ambiguous concerning *from which* trust Max Riekse could pay Nelly Riekse \$150,000.

When dividing marital property, the trial court must first determine whether an asset is marital or separate.¹⁰ Separate assets are those assets that a party acquired before the marriage.¹¹ Generally, "each party takes away from the marriage the party's own separate estate with no invasion by the other party."¹² However, the trial court may invade a party's separate assets on a showing of need by the other party.¹³ An award may be insufficient for one party's suitable support if it will not support the party in the manner to which the party was accustomed.¹⁴

Here, the trial court indicated that it was invading Max Riekse's separate trust fund, meaning the family trust, on the basis of Nelly Riekse's needs. Nelly Riekse testified that her current monthly expenses were \$3,000, which included rent, food, gasoline, electric, phone, and internet expenses. However, Nelly Riekse testified that this amount was barely sufficient to meet her needs. Nelly Riekse also testified that she required a home with an art room to pursue her career, but was currently living in a two-bedroom apartment with the parties' son.

The property award left Nelly Riekse with \$45,550 in home equity and an additional \$15,000 to purchase a vehicle. Nelly Riekse testified that she arrived in this country with about \$3,000 at the time of the parties' marriage and that Max Riekse prohibited her from working during the marriage. The trial court found that Nelly Riekse had been dependent on Max Riekse for her basic needs, and expected that Max Riekse would continue to support her. The trial

¹⁰ *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997).

¹¹ *Cunningham v Cunningham*, 289 Mich App 195, 201; 795 NW2d 826 (2010).

¹² *Reeves*, 226 Mich App at 494.

¹³ MCL 552.23(1); *Reeves*, 226 Mich App at 294.

¹⁴ See *Reeves*, 226 Mich App at 294.

court's division of property left Max Riekse with the marital home, but Nelly Riekse—who was accustomed to a larger living space with a space to practice her profession—was living in a two-bedroom apartment at the time of trial. Additionally, Nelly Riekse had been recently diagnosed with an advanced stage cancer, and was facing uncertain costs related to her future medical care. Given these facts, we are not definitely and firmly convinced that the trial court made a mistake when it determined to invade Max Riekse's separate assets on the basis of Nelly Riekse's demonstration of need.

III. SPOUSAL SUPPORT

A. STANDARD OF REVIEW

This Court reviews for clear error the trial court's findings of fact concerning spousal support.¹⁵ If the trial court's findings of fact are not clearly erroneous, this Court must decide whether the dispositional ruling was fair and equitable.¹⁶ This Court reviews for an abuse of discretion the trial court's decision to award spousal support, and must affirm the trial court's decision unless it was inequitable.¹⁷

B. LEGAL STANDARDS

The objective of spousal support is to balance the incomes and needs of the parties in a way that is just and reasonable under the circumstances of the case without leaving either party impoverished.¹⁸ To determine whether spousal support is just and reasonable, the trial court should consider a wide variety of factors, including:

(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 spousal support; (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.^{19]}

¹⁵ *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003); *Beason*, 435 Mich at 805.

¹⁶ *Sparks*, 440 Mich at 151-152; *Gates*, 256 Mich App at 433.

¹⁷ *Gates*, 256 Mich App at 433.

¹⁸ *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336 (2008).

¹⁹ *Id.* at 726-727.

C. APPLYING THE STANDARDS

Max Riekse contends that (1) the trial court's findings of fact regarding the spousal support factors were clearly erroneous, and (2) the trial court abused its discretion by awarding Nelly Riekse spousal support for a period longer than the marriage. We disagree.

A strong theme in Max Riekse's brief on appeal is that the trial court should not have required him to support Nelly Riekse because she could return to Russia, where she would be more likely to secure employment and would have family support. The trial court rejected this assertion, as do we. Nelly Riekse was the son's sole caretaker while Max Riekse was in Iraq, and has continued to be involved in the son's life. The parties currently have joint custody of their son and both parties want their son to continue in his current school district. It would not be feasible for Nelly Riekse to continue to enjoy joint custody of her son while living in Russia. Thus, to the extent that the trial court did not consider Nelly Riekse's prospects in Russia when determining her ability to work and her present and future situation, we conclude that the trial court did not clearly err.

Here, the trial court found that the past relations and conduct of the parties favored Nelly Riekse because of Max Riekse's temper and controlling behavior. It found that the ten-year length of the marriage also weighed in favor of spousal support. It found that Nelly Riekse had "limiting factors that prohibit her from entering the workforce," including that she lacked English proficiency, her cancer diagnosis, and the highly competitive nature of her field. The trial court found that Nelly Riekse's income was "minimal" and Max Riekse's income was "in excess of six figures." The trial court also found that Nelly Riekse's lack of income would otherwise prevent her from educating herself, without the assistance of spousal support. The trial court found that the parties' ages supported spousal support because, though Max Riekse was 64 and retired, Nelly Riekse was entering "that fiftyish age range of employment limbo" and she had been a homemaker during the marriage.

The trial court found that Max Riekse lived in the marital home and was financially independent, while Nelly Riekse lived in a rented apartment and was financially dependent. It also found that Max Riekse did not have any continuing debilitating illness, while Nelly Riekse suffered from colon cancer. It found that the prior standard of living of the parties also supported spousal support, because Nelly Riekse had moved from a large house with an art room to a small apartment. And finally, it found that general principles of equity supported spousal support because Max Riekse brought Nelly Riekse to the United States from Russia, which was far from family support, and that Nelly Riekse believed that Max Riekse would support her for the rest of her life. It found that both parties contributed to the marital estate, with Max Riekse contributing through "hard work from his careers in teaching and in the military" and Nelly Riekse contributing through "hard work as a spouse, homemaker, and mother."

Max Riekse contends that Nelly Riekse was able—but simply unwilling—to work. We are not definitely and firmly convinced that the trial court made a mistake when it found that Nelly Riekse did not have the ability to work.

Here, the trial court found that Nelly Riekse was unable to work on the basis of her age, lack of recent work experience, limited English proficiency, and health issues. Family friends

testified that Nelly Riekse’s English was limited, she required the assistance of a friend to testify at trial, and the transcripts in this case alone demonstrate her limited English speaking proficiency. Nelly Riekse testified that she had not worked outside the home in ten years because Max Riekse forbade her from doing so. Additionally, Nelly Riekse’s repeated statements that she hoped that she would be “invited” to work on the basis of her Grand Rapids Art Prize submission, when read in context, are clear references to Nelly Riekse’s hopes that she would obtain commissions. Nelly Riekse had been diagnosed with metastatic colon cancer at the time of trial, and was expecting to endure future treatments. We conclude that the trial court’s finding that this factor favored Nelly Riekse was not clearly erroneous.

Concerning the remainder of the spousal support factors, Max Riekse urges this Court to reevaluate the evidence at trial in his favor. However, this Court recognizes that the finder of fact is in a better position to determine the weight of the evidence and the credibility of the witnesses.²⁰ We have reviewed the trial court’s findings regarding the remainder of the spousal support factors, and—with the exception that the trial court found that Max Riekse was 64 years old when he was actually 65 years old—the trial court’s findings are not clearly erroneous.

Finally, Max Riekse contends that the trial court’s award of spousal support was inequitable because the balance of factors favored him and because it is inequitable for the trial court to order spousal support for longer than the marriage itself. As stated above, the length of the parties’ marriage was 10 years. Thus, the trial court did not award spousal support for a longer period than the marriage itself. And, considering the balance of the factors above, we conclude that the trial court’s award of spousal support was not inequitable.

We affirm.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher

²⁰ *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 101; 754 NW2d 259 (2008).