

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT L. SCHWARTZ,

Plaintiff-Appellee,

v

PAMELA J. SCHWARTZ,

Defendant-Appellant.

UNPUBLISHED

March 20, 2003

No. 231266

Oakland Circuit Court

LC No. 99-630175-DO

Before: Cooper, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgment of divorce ending the parties' marriage of approximately twenty-six years. We affirm.

I

Defendant initially challenges the trial court's award of alimony. The court awarded defendant alimony for ten years in the amount of \$6,818 a month, terminable only upon her death. We find no error.

A trial court's findings in a divorce action are reviewed by the standard set forth in *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002):

In a divorce action, this Court's review of the trial court's factual findings is limited to clear error. A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. If the trial court's findings of fact are upheld, we then must decide whether the dispositive ruling was fair and equitable in light of those facts. A dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. [Citations omitted; see also *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000).]

Defendant asserts that the trial court improperly relied upon alimony guidelines known as the "Alimony Prognosticator 2000," rather than another version known as the Ross Guidelines. However, a review of the record reveals that defendant urged reliance on the Alimony

Prognosticator as a basis for calculating alimony. A party may not advocate one position in the trial court and subsequently take a contrary position at the appellate level. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Accordingly, we reject this claim of error.¹

Defendant further claims that the trial court should have awarded permanent alimony in this case. Specifically, defendant cites the length of the marriage, the significant income differential, and the amount of time she spent away from her career. We note that the main purpose of awarding alimony is to balance the incomes and needs of the parties without impoverishing either party. *Moore, supra* at 654. According to *Demman v Demman*, 195 Mich App 109, 110-111; 489 NW2d 161 (1992):

A court may award alimony in a divorce action “as it considers just and reasonable,” after considering the ability of either party to pay, the character and situation of the parties, and all other circumstances in the case. Several relevant factors should be considered by the court, including, but not limited to, the past relations and conduct of the parties, the length of the marriage, the ability of the parties to work, the ages of the parties, the needs of the parties, the health of the parties, and general principles of equity. In addition, a party’s fault in causing the divorce is a valid consideration in awarding alimony. [Citations omitted.]

Essentially, a trial court must make a determination of alimony that “is just and reasonable under the circumstances of the case.” *Moore, supra* at 654.

The trial court in this case specifically considered the *Demman* factors when determining the alimony award. The parties agreed that alimony was appropriate given the fact that defendant stayed at home while the parties’ children were in school and living at home. The trial court specifically noted that defendant “invested the last 12 years in raising and educating the children and maintaining the home and this has enabled [plaintiff] to reach an extraordinarily high income level at his law practice.” It appears that the trial court took this factor into consideration when she awarded the defendant alimony.

The trial court also noted the difficulty defendant might have reestablishing her career. It was undisputed that defendant had a successful career as a lawyer before taking time off to care for her family. Although defendant was out of the work force for nearly twelve years, the evidence established that defendant had the education and skills to develop a successful career in the future. Therefore, the court imputed an annual income to defendant at a reduced level of \$35,000. Moreover, even if defendant failed to resume a law practice, her legal education would continue to be an asset to her future career. An award of alimony for ten years was appropriate to allow defendant time to become reestablished in the work force, and still meet her needs for the short-term future.

¹ We also find no merit to defendant’s contention that the trial court improperly considered the parties’ contributions to their children’s educations when determining alimony. The trial court specifically stated that it did not consider the parties’ future obligations to pay for their children’s educational expenses in its determination of alimony.

Defendant claims that the emotional abuse she suffered should have been considered in determining the alimony award. While the marriage was lengthy, the trial court found that both parties were equally at fault for causing its dissolution. We are not convinced that the alimony award was improper in light of these factors. Accordingly, we cannot say that the trial court abused its discretion in the amount or limitation of alimony.

Defendant next argues that the trial court should have ordered plaintiff to pay her medical insurance for the full thirty-six month period available under federal law. 29 USC 1161-1163. However, defendant fails to fully acknowledge that the court ordered plaintiff to make coverage available for her under his health plan through COBRA for three years. Defendant would only be required to pay the premiums if she was without her own health care coverage eighteen months after the dissolution of the marriage. Absent an offer of proof regarding the cost of the premiums, defendant has failed to show that this was inequitable.

The trial court's award of \$6,818 a month in alimony took into account the duration of the marriage, defendant's sacrifices during the marriage, and any difficulties defendant might encounter when reentering the job market.

II

Defendant next claims that the trial court erred when it held her liable for debts that plaintiff unilaterally incurred during the marriage. We disagree.

During the marriage, the parties incurred substantial debt to finance the cost of their children's education at private schools. It was clear from the evidence that both parties considered their children's education a priority. Although defendant claimed that she was unaware of the amount of debt they actually incurred to pay for private schooling, the trial court found this unlikely. Because the court believed that the past educational debts for the children were part of the marital estate, the court held that both parties were liable for the debts incurred up to the start of trial. However, the court held that after the start of the trial, each party would be individually responsible for paying off any future educational debts incurred by that party. See MCL 552.16a(4). Accordingly, we find that the balances owed on these loans at the time of trial were properly considered marital debt and were properly divided between the parties.

III

Defendant further asserts that the trial court erroneously failed to compensate her for the value of plaintiff's investment in his law firm. We disagree.

No expert testimony was offered at trial regarding the value of plaintiff's capital contribution account held as a marital asset. Plaintiff estimated its value at between \$35,000 and \$36,000. A party seeking to include an asset in the marital estate has the burden of proving the reasonable, ascertainable value of that asset. *Wiand v Wiand*, 178 Mich App 137, 149; 443 NW2d 464 (1989).

The trial court in this case properly concluded that there was no ascertainable marketable value to plaintiff's capital contribution account based on the evidence presented. The evidence

showed that plaintiff could not sell the shares he held in his firm. Moreover, plaintiff's practice, depended principally on his own personal skills and expertise and was not marketable to other attorneys.²

IV

Defendant next argues that the trial court erred when it failed to award her the marital home and appointed a receiver to sell the property. We disagree. The family court, as a court of equity, has the power to order the sale of a marital residence as part of divorce proceedings. *Yeo v Yeo*, 214 Mich App 598, 602; 543 NW2d 62 (1995). The court may also appoint a receiver when other approaches have failed to achieve compliance with the court's orders. MCL 600.2926; *Wayne Co Jail Inmates v Wayne Co Chief Executive Officer*, 178 Mich App 634, 658-659; 444 NW2d 549 (1989). We review a trial court's decision to appoint a receiver for an abuse of discretion. *Wayne Co Jail Inmates, supra* at 651.

After a careful review of the record, we find no clear error with the trial court's decision to order the sale of the parties' home. While the evidence shows that defendant had a sentimental attachment to the house, she was without the financial resources to continue living in the house.³ The marital home was the only asset that could be used to pay off the substantial debt acquired by the parties. The home was worth approximately \$1 million, however the equity in the home was reduced to approximately \$200,000 due to multiple refinancings. Under the circumstances, the trial court acted reasonably in ordering this asset sold to recover the equity in the property and eliminate the substantial debt incurred by the parties.

We also find that the trial court's appointment of a receiver was appropriate. The appointment of a receiver was conditioned on the parties' cooperation in selling the house. There was sufficient evidence that defendant was unwilling to sell the house. Thus, if defendant agreed to sell the house voluntarily, she would avoid the expenses associated with a receiver.

V

Defendant also maintains that the trial court erred in ruling that certain United States Savings Bonds, issued jointly in the names of the parties' children and plaintiff, were not part of the marital estate. We disagree. "[A]ssets earned by a spouse during the marriage, whether they are received during the existence of the marriage or after the judgment of divorce, are properly considered part of the marital estate." *McNamara, supra* at 183.

Defendant agreed at trial that the savings bonds were gifts to the parties' children for their education. Accordingly, the trial court determined that the savings bonds were not part of the marital estate because they belonged to the children.

² We note that plaintiff practiced law in a highly specialized area and had difficulty finding help in his practice.

³ We do not believe that defendant's financial contributions to keep the home in the past were any more important than plaintiff's financial contributions over the years.

VI

Defendant ultimately argues that the trial court erred in refusing to award her \$25,000 in attorney fees. We disagree. This Court reviews a trial court's decision to award attorney fees for an abuse of discretion. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). In a divorce action, attorney fees are not recoverable as of right, but are "awarded only where necessary to preserve the party's ability to carry on or defend the action." *Id.*; see also MCL 552.13(1); MCR 3.206(C)(2).

The trial court erroneously stated that plaintiff was previously *ordered* to pay \$10,000 to defendant's first attorney. However, that misstatement does not in and of itself require reversal of the court's ruling. It is undisputed that plaintiff provided defendant with \$10,000 to cover the cost of her first attorney. Defendant requested the additional \$25,000 because she retained a new attorney only one week prior to the start of the trial. Under the circumstances, the trial court did not abuse its discretion by refusing to require plaintiff to pay defendant's additional attorney fees. *Stoudemire, supra* at 344.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly