

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH LYNN CRISSMAN, a/k/a
DEBORAH LYNN BARNETT,

Plaintiff-Appellant,

v

JOHN D. CRISSMAN, SR.,

Defendant-Appellee.

UNPUBLISHED
February 14, 2003

No. 228304
Wayne Circuit Court
Family Division
LC No. 98-830922-DO

Before: Jansen, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

In this divorce action, which involved only issues of property division and spousal support, plaintiff appeals as of right from the amended judgment of divorce that divided the parties' marital estate. We affirm.

When plaintiff filed for divorce, the parties had been married for thirty-five years. Defendant completed medical school during the marriage, and, at the time of trial, was employed as the interim dean of a major medical school. Plaintiff obtained nursing and law degrees after the parties married, but had discontinued practicing both nursing and law by 1998, when she filed for divorce. During the marriage, the parties also raised two children, now adults, and amassed a large marital estate that is the focus of this appeal.

I

Plaintiff first contends that the circuit court erred in awarding her \$72,000 per year in nonmodifiable spousal support terminable on her death, remarriage, or during 2004, the year of defendant's planned retirement. This Court reviews for clear error a trial court's factual findings related to either the valuations of particular marital assets or an award of spousal support. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Clear error exists when, after considering all the evidence, a reviewing court possesses the definite and firm conviction that the trial court made a mistake. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). "If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts." *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). This Court should affirm the trial court's discretionary dispositive ruling unless it "is left with the firm conviction that the division was inequitable." *Sparks, supra* at 152.

“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.” *Moore, supra* at 654. Spousal support should consist of a just and reasonable amount in light of the following circumstances: (1) the parties’ past relations and conduct; (2) the length of the marriage; (3) the parties’ abilities to work; (4) the source and amount of property awarded to the parties; (5) the ages of the parties; (6) the parties’ abilities to pay alimony; (7) the parties’ present situations; (8) the needs of the parties; (9) the health of the parties; (10) the parties’ prior standard of living; (11) the parties’ contributions to the joint estate; (12) general principles of equity; and (13) a party’s fault in causing the divorce. MCL 552.23(1); *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996); *Thames v Thames*, 191 Mich App 299, 307-308; 477 NW2d 496 (1991).

A

Plaintiff’s initial suggestion that the circuit court erred in failing to cite authority in support of its spousal support award lacks merit. Findings of fact concerning “matters contested at a bench trial are sufficient if they are ‘[b]rief, definite, and pertinent,’ and it appears that the trial court was aware of the issues in the case and correctly applied the law, and where appellate review would not be facilitated by requiring further explanation.” *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). In this case, the circuit court’s findings of fact reflect its careful consideration of at least eleven of the thirteen spousal support factors, and its award of spousal support to plaintiff in accordance with its findings that seven of the factors favor plaintiff.

B

Plaintiff next suggests that the circuit court improperly awarded a nonmodifiable amount of spousal support. The modifiability of an award of spousal support generally depends on whether the spousal support awarded qualifies as periodic alimony or alimony in gross. *Pinka v Pinka*, 206 Mich App 101, 103; 520 NW2d 371 (1994). “Although the circuit court has the authority to modify an alimony award upon a showing of a change in circumstances, MCL 552.28 . . . , an exception exists for alimony in gross which cannot be modified absent a showing of fraud.” *Tomblinson v Tomblinson*, 183 Mich App 589, 593; 455 NW2d 346 (1990). Alimony in gross constitutes a sum certain payable either in one lump sum or in periodic payments of a definite amount over a specific period of time. *Bonfiglio v Pring*, 202 Mich App 61, 63; 507 NW2d 759 (1993).

We find that the court intended to award plaintiff alimony in gross. The court awarded plaintiff continuous payments of a definite amount throughout one of several specific periods of time, and explicitly ordered that the parties could not modify the award. *Pinka, supra* at 105; *Bonfiglio, supra* at 63, 65. Furthermore, the record reflects that the circuit court intended the spousal support payments to supplement plaintiff’s income not beyond 2004, the year of defendant’s planned retirement, when plaintiff would turn sixty-two and become eligible to receive income from the \$1.35 million in retirement account assets that the court awarded her. *Pinka, supra* at 105.¹ While the award contemplated termination of spousal support on the

¹ The court also explained on the record that the nature of its spousal support award was “rehabilitative,” a purpose consistent with an intent to provide alimony in gross. *Bonfiglio*, (continued...)

earliest occurrence of plaintiff's death or remarriage, or the time of defendant's retirement, the existence of such contingencies alone does not preclude a finding of alimony in gross. *Pinka, supra* at 102-105; *Bonfiglio, supra* at 64-65. Accordingly, the circuit court properly awarded nonmodifiable support for a discrete period and for a specific purpose. *Pinka, supra*.

C

Plaintiff also challenges the circuit court's finding that factor three, the parties' abilities to work, favored defendant. Ample trial testimony by plaintiff and defendant indicated that plaintiff possessed nursing and law degrees and most recently specialized in estate planning work, but that since the 1980s had chosen not to work full time and ultimately gave up working altogether. Furthermore, the testimony of plaintiff, defendant, and plaintiff's twin sister and her husband agreed that plaintiff had done a lot of physically demanding work preparing the parties' recently constructed retirement beach house in Cape Charles, Virginia. Plaintiff's own testimony also indicated that she had gone scuba diving and otherwise traveled. Furthermore, while plaintiff suggested she would have difficulty driving from the beach house over an 18-mile bridge to mainland, metropolitan Virginia Beach to get a job, plaintiff also estimated that she typically would cross the bridge three times per week to perform other errands.

In light of this evidence, we do not possess the definite and firm conviction that the circuit court made a mistake in its finding regarding plaintiff's ability to work. To the extent that the circuit court found that plaintiff and her sister exaggerated plaintiff's inability to drive and the seriousness of plaintiff's headaches, blurred vision and dizziness, this Court defers to the circuit court's credibility determinations. MCR 2.613(C); *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000).

D

We reject plaintiff's claim that the circuit court clearly erred in finding that spousal support factor four, the amount and source of property awarded to the parties, favored defendant. According to evidence produced at trial regarding the values of the parties' assets, the court awarded plaintiff a total asset value of approximately \$2.69 million, exclusive of spousal support, while the court awarded defendant assets worth approximately \$2.46 million.² In addition to plaintiff's nearly \$1.35 million share of the parties' retirement accounts and the beach house with its equity value of \$771,600, plaintiff received a share of the parties' nonretirement investments amounting to \$513,102, as well as \$21,850 in proceeds from the sale of the parties' Alpena real estate, and defendant's obligation to pay the beach house builder up to \$15,000 to satisfy the construction contract. Because plaintiff received a larger total award than defendant, the court did not clearly err in finding that factor four favored defendant.

E

(...continued)

supra at 65.

² These amounts do not include the values of the personal property the court awarded.

In a somewhat confusing manner, plaintiff also argues that the circuit court inequitably awarded only \$6,000 per month in spousal support, which would not cover her living expenses at the parties' beach house. While plaintiff's argument rests on her assertion at trial that living in the beach house would cost her \$185,000 in annual expenses, we discern no clear error in the circuit court's rejection of plaintiff's proffered expenses. Defendant testified that in light of plaintiff's spending history during the marriage and the nonrecurring nature of many of her claimed beach house expenses, plaintiff could comfortably satisfy her beach house living expenses with \$116,790 per year. The testimony of plaintiff and defendant indicated that during the later years of the parties' marriage plaintiff had managed the parties' finances, with the exception of the mortgage payment, with a monthly allowance of between \$3,000 and \$4,700, a small fraction of the \$15,500 in monthly expenses she sought at trial. The trial court, however, explicitly discredited plaintiff's attempts to inflate some expenses and to include nonrecurring expenses within her annual budget. This Court will not revisit the circuit court's credibility determination with respect to plaintiff's claimed expenses. *Mogle, supra*.

We do not possess the firm conviction that the circuit court's spousal support award was inequitable, because the record reflects that plaintiff could meet annual expenses less than the inflated amount rejected by the court. Plaintiff received \$72,000 in annual spousal support, plus more than \$450,000 from the parties' nonretirement investment accounts. Unrebutted expert testimony by a financial consultant indicated that, taking into account these amounts, and assuming that (1) plaintiff's annual beach house expenses constituted \$116,790, (2) plaintiff invested her retirement and nonretirement investment accounts in the stock market, and (3) the investments grew at a rate between 11 and 15 percent, plaintiff would never exhaust her funds.³

In light of the facts that (1) the award of spousal support amounting to \$72,000 alone would satisfy plaintiff's annual expenses of \$116,790, the amount estimated by defendant, whom the court apparently credited in this regard, and (2) the expert's conservative projections, on the basis of the spousal support and nonretirement investment account money received by plaintiff and the supposition that plaintiff would not work, plaintiff still could spend as much as \$170,000 each year and have money until age ninety-one, we find nothing inequitable about the circuit court's award of spousal support.⁴

II

Plaintiff next argues that the circuit court erred in its \$910,600 valuation of the beach house, which the court awarded to plaintiff. This Court reviews a circuit court's findings of fact

³ Even if plaintiff placed her assets in fixed growth investments guaranteeing a seven percent return, as recommended by her financial consultant, plaintiff's assets would endure until she became eighty-one years of age.

⁴ Plaintiff provides no authority supporting her argument that the circuit court had an obligation to make findings concerning the tax consequences of spousal support beyond the findings the court made. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997) ("A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim.").

concerning the valuation of marital assets for clear error. *Welling v Welling*, 233 Mich App 708, 709; 592 NW2d 822 (1999); *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988).

The parties each presented abundant evidence concerning the value of the beach house, including the testimony of expert appraisers. At some length, the circuit court accurately summarized the testimony of plaintiff and defendant regarding their purchase of the beach front lot for \$260,000 in 1991, their expenditure of approximately \$1 million constructing and finishing the approximately 6,300-square foot beach house with many exceptional features, and the extensive testimony of the appraisers concerning their efforts to arrive at the value of the beach house. The record undisputedly indicates that the parties purchased the lot in an upscale area in the beginning stages of development, that construction of a new resort and residential development had begun near the beach house, and that property values in Cape Charles were rising.

After carefully reviewing all of the evidence presented concerning the value of the beach house, we cannot conclude that the circuit court clearly erred in assigning the house a value of \$910,600.⁵ The court's valuation rested on appraisal information provided by the parties' experts, and fell within the range of the valuations offered by plaintiff's expert (\$750,000) and defendant's expert (\$950,000). To the extent that plaintiff challenges the court's determination to credit various aspects of defendant's appraiser's testimony, including his opinion that a low income housing area along the road to the subdivision containing the beach house would not affect the value of the beach house, we defer to the circuit court's credibility determinations. *Stoudemire v Stoudemire*, 248 Mich App 325, 338-339; 639 NW2d 274 (2001).

III

Plaintiff further asserts that the circuit court erred in its finding that the increase in value of money that plaintiff inherited from her mother during the marriage constituted a marital asset. This Court reviews for clear error the circuit court's factual findings with respect to whether a particular asset qualifies as marital or separate property. *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002).

When dividing assets incident to a divorce, a circuit court must first address whether an asset is properly considered a marital or separate asset. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997); *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (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." *Reeves*, *supra* at 494. "Normally, property received by a married party as an inheritance, but kept separate from marital property, is deemed to be separate property not subject to distribution."

⁵ The court ultimately multiplied the size of the house (6,280 square feet) by plaintiff's appraiser's estimated cost of \$145 per square foot for top quality construction. We note that plaintiff, who cites Michigan Tax Tribunal cases and a Michigan taxation statute, as well as Virginia case law, provides no Michigan authority for the proposition that, within the context of a divorce case, asset valuation must adhere to any particular real property valuation method. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998) (noting an appellant may not leave it to this Court to locate authority to sustain or reject his position).

Dart v Dart, 460 Mich 573, 584-585; 597 NW2d 82 (1999). A spouse's separate estate may be opened for redistribution, however, when the other spouse significantly assists in the acquisition or growth of the separate asset. *Reeves, supra* at 494-495, citing MCL 552.401.

The circuit court did not clearly err in determining that the appreciation in value of plaintiff's inheritance money qualified as a marital asset because defendant actively contributed to the growth of the inheritance during the marriage. The record reflects that plaintiff attempted to maintain her inheritance money in separate investment accounts in her name and the name of her trust. However, defendant undisputedly paid income taxes on the interest and dividends that the inheritance accounts earned, earnings that the parties had claimed on their joint tax returns beginning in 1995.⁶ Both parties acknowledged that defendant made possible the inheritance accounts' appreciation during the marriage by paying for all the parties' expenses. Both parties further agreed that plaintiff had spent money from the inheritance accounts for family purposes, including expenses for the beach house and Grosse Pointe Park house and a gift to the parties' son, and that defendant routinely reimbursed plaintiff the money she had spent from the inheritance accounts. Plaintiff herself also wrote checks with marital funds to replenish the inheritance accounts. Under these circumstances, we are not left with the definite and firm conviction that the circuit court erred in finding that the appreciation in value of the inheritance accounts constituted a marital asset. MCL 552.401; *Reeves, supra* at 494-497; *Hanaway v Hanaway*, 208 Mich App 278, 292-295; 527 NW2d 792 (1995).

IV

We reject plaintiff's claim that the circuit court also clearly erred in finding that the investment of marital money in Brock Corporation, a business of the parties' son-in-law, constituted a marital asset. *McNamara, supra*. Defendant recalled that in 1997 and 1998, after he and plaintiff had discussed the matter several times, the parties invested \$70,000 in the stock of Brock Corporation, a business started by their daughter's husband in 1997, and gave the corporation another \$50,000 for a loan, which was currently in default. Defendant acknowledged that he might not have discussed with plaintiff the specific amounts of money he intended to invest, but denied that plaintiff voiced any objection to the investment until after she filed for divorce. At trial, plaintiff denied knowing that defendant planned to invest any money in Brock Corporation and expressed her disapproval of the investment. The record supports the circuit court's finding that the parties agreed to make the investment of marital funds in Brock Corporation, and we will not second guess the court's explicit determination that plaintiff's disapproval of the investment at trial was "disingenuous." *Stoudemire, supra* at 339; *Welling, supra*.⁷

V

⁶ The inheritance investment accounts also consistently appeared on annual joint financial statements prepared for the parties.

⁷ We note that plaintiff again fails to cite any authority for the proposition that the circuit court could not consider the documentation establishing plaintiff's trust. *Mudge, supra*.

Defendant next avers that the circuit court did not equally divide the marital estate. We must affirm the court's dispositive ruling unless we are left with the firm conviction that the property division was inequitable. *Sparks, supra*.

An equitable distribution of marital assets means that the assets will be roughly congruent, not that the division be mathematically equal. *McNamara, supra* at 188. In this case, the circuit court did not award the parties a mathematically equal amount of property, but awarded plaintiff, who received \$2.69 million exclusive of alimony, a higher property value than defendant, who received \$2.46 million. We find that this overall division of property appears roughly congruent and in no way unfair or inequitable from plaintiff's perspective.

Defendant additionally challenges several specific elements of the court's property division. Regarding the 1998 income tax refunds, defendant testified that in accordance with his usual habit he applied the amounts of the parties' 1998 federal, state and local tax refunds toward their tax liabilities for 1999. Because defendant did not possess the refund money, the circuit court did not clearly err in finding that "there [wa]s no tax refund to be divided." Furthermore, the inclusion of the amount of the refund, approximately \$47,000, in favor of either party would not have rendered unfair or inequitable the circuit court's overall dispositions to each party of property amounting to nearly \$2.5 million.

With respect to life insurance, the circuit court awarded plaintiff and defendant the life insurance policies on their own lives. One of plaintiff's life insurance policies, which she urged the court to award her at trial, had a cash surrender value of approximately \$4,219, while one of defendant's life insurance policies had a cash surrender value of approximately \$19,025. In light of the total asset values that the circuit court awarded the parties, the \$15,000 difference between the values of their life insurance policies did not render the property disposition unfair or inequitable.

Regarding two of the parties' bank accounts, defendant's testimony indicated that he had spent all but \$3,000 of the nearly \$66,000 within these accounts on the Brock Corporation investments and his attorney fees. We find without merit plaintiff's suggestion that the court's failure to award this \$3,000 amount rendered the marital property distribution unfair or inequitable.

Plaintiff has not substantiated her suggestion that the circuit court unfairly divided the parties' personal property. Plaintiff provides on appeal no description of values with respect to the furnishings and other personal property awarded to the parties. *Mudge, supra*. The circuit court awarded each party the personal property located within the house they would occupy after the divorce, with the exception that the court also awarded plaintiff a lengthy list of her desired property from the Grosse Pointe Park house awarded to defendant. We cannot characterize the court's property division as inequitable.⁸ We lastly note that plaintiff cites no authority regarding the impropriety of the circuit court's consideration of the documentation establishing

⁸ We also note that plaintiff refers to facts not of record and cites no authority regarding her suggestion that the circuit court committed evidentiary error. *Mudge, supra*.

plaintiff's trust, which the court apparently utilized to ascertain what personal property plaintiff prized before filing for divorce. *Mudge, supra*.

VI

Plaintiff further challenges the circuit court's denial of her request for attorney fees and other litigation costs. This Court reviews for clear error a trial court's findings of fact related to a ruling whether to award attorney fees, and for an abuse of discretion the court's ultimate decision to award a litigant attorney fees. *Solution Source, Inc v LPR Assoc's Ltd Partnership*, 252 Mich App 368, 381-382; 652 NW2d 474 (2002); *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999).

A party in a domestic relations matter who is unable to bear the expense of attorney fees may recover reasonable attorney fees if the other party is able to pay. *Kosch, supra*, citing MCR 3.206(C)(2). Plaintiff, as the party seeking to recover attorney fees, was required to allege facts sufficient to show that she could not bear the expense of the action. *Kosch, supra*. A trial court also may award attorney fees when the party requesting payment has been forced to incur them because of the other party's unreasonable conduct during the course of the litigation. *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997).

The testimony of plaintiff and defendant established that shortly before filing for divorce, plaintiff withdrew \$90,000 in marital funds, and spent \$25,000 on attorney fees in the form of a retainer of her current counsel and paid an additional \$2,500 to Plante Moran for accounting work regarding the case. Even assuming that plaintiff incurred attorney fees beyond the \$25,000 retainer amount, the circuit court did not clearly err in finding that plaintiff did not show her need for an award of fees. The court awarded plaintiff a very substantial property disposition, plaintiff received \$72,000 per year in spousal support, plaintiff had access to marital funds that she spent on attorney fees, and plaintiff also received monthly temporary support of \$5,000 during the litigation. While plaintiff requested reimbursement of her attorney fees, she simply failed to demonstrate, beyond her mere assertion, that she could not afford the expense of the divorce litigation. *Kosch, supra*.

Plaintiff also sought reimbursement for her alleged incurrence of \$18,000 in expert accounting witness fees by Plante Moran. Our review of the record, which shows that an accountant testified briefly at trial regarding computerized alimony guidelines and alimony tax consequences to defendant, convinces us that the circuit court did not clearly err in finding the requested expert accounting fees "ridiculously high in proportion to their value," and in finding reasonable the \$2,500 amount that plaintiff had paid the firm. Moreover, plaintiff likewise failed to substantiate her need for reimbursement of the accounting fees. *Id.*

Under these circumstances, we cannot conclude that the circuit court abused its discretion in denying plaintiff's request for attorney fees and costs. *Id.*

VII

Plaintiff lastly requests that this case be remanded for further proceedings before a different circuit judge because of the presiding judge's bias against plaintiff. However, because the court made no apparent errors or inequitable rulings, we find no basis for a remand.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage