

STATE OF MICHIGAN
COURT OF APPEALS

JUDITH A. ZWERK,

Plaintiff-Counterdefendant-
Appellee,

V

MICHAEL A. ZWERK,

Defendant-Counterplaintiff-
Appellant.

UNPUBLISHED

February 8, 2005

Nos. 247527; 253660

Saginaw Circuit Court

LC No. 00-035840-DO

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

PER CURIAM.

Defendant Michael A. Zwerk appeals as of right in Docket No. 247527 and by leave granted in Docket No. 253660. On appeal, defendant challenges the trial court's jurisdiction to entertain the divorce action, the judgment of divorce relative to property division and spousal support, the failure of the court to reopen proofs, the court's authority to enter a postjudgment order after the claim of appeal was filed, and the substance of that postjudgment order. We affirm in part and remand in part.

I. Jurisdiction

Defendant challenges the jurisdiction of the Saginaw Circuit Court to hear the divorce action filed by plaintiff and enter judgment, where the parties had been lifelong residents of Tuscola County, which is also the location of the marital property, including the farming operation, and where defendant had moved only temporarily to a Saginaw County apartment after leaving the marital home without intent, allegedly, to make Saginaw County a permanent place of abode. We reject defendant's argument.

MCL 552.9(1) provides:

A judgment of divorce shall not be granted by a court in this state in an action for divorce unless the complainant or defendant has resided in this state for

180 days immediately preceding the filing of the complaint and, except as otherwise provided in subsection (2),¹ the complainant or defendant has resided in the county in which the complaint is filed for 10 days immediately preceding the filing of the complaint.

The circuit court's jurisdiction in a divorce action is strictly statutory. *Stamadianos v Stamadianos*, 425 Mich 1, 5; 385 NW2d 604 (1986). The ten-day county residency requirement set forth in MCL 552.9(1) "represents a jurisdictional limitation on the circuit court's power to enter a divorce decree." *Stamadianos, supra* at 7. Consequently, if the residency requirements of the statute are not met, the court cannot grant a judgment of divorce and must dismiss the case. *Smith v Smith*, 218 Mich App 727, 730; 555 NW2d 271 (1996). Subject-matter jurisdiction may be raised at any time. *Id.* at 729-730. Jurisdiction under the statute cannot be conferred by waiver or consent of the parties. *Id.* at 733.

Whether a court has subject-matter jurisdiction under the statute is a question of law that this Court reviews de novo. *Id.* at 729; *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000). A determination regarding "residency" and "intent," however, also concerns a question of fact, and the trial court's factual findings are entitled to great weight. *Leader v Leader*, 73 Mich App 276, 283; 251 NW2d 288 (1977).

The residency requirement must be met on the original filing date. *Pierson v Pierson*, 132 Mich App 667, 671; 347 NW2d 779 (1984). Additionally, the *Smith* panel, addressing MCL 552.9(1), stated:

When used in statutes conferring jurisdiction, residence is interpreted to mean legal residence or domicile. The issue of legal residency is principally one of intent. Presence, abode, property ownership, and other facts are often considered, but intent is the key factor. [*Smith, supra* at 730-731 (citations omitted).]

Residence is defined under Michigan law as a place of abode accompanied with the intention to remain. *Leader, supra* at 280.

Here, we begin by noting that defendant admitted the allegation contained in plaintiff's complaint that he had resided in Saginaw County for more than ten days. Furthermore, defendant filed a counterclaim for divorce in Saginaw County. Defendant did not raise the jurisdictional issue until approximately seventeen months after the litigation was commenced. The issue was again raised post judgment in a motion for relief from judgment.

Momentarily setting aside the issue of intent, there is no dispute that, at the time the complaint was served on defendant, he had been present and living in Saginaw County for more than ten days, his place of abode had been Saginaw County for more than ten days, and he had held a leasehold property interest in Saginaw County for more than ten days.

¹ Subsection (2) is inapplicable.

Focusing now on defendant's intent, we find that the most relevant evidence reflecting intent to remain in the county, for at least an entire year, is the one-year lease executed by defendant. The lease agreement contained a provision which indicated that defendant would be held responsible for all obligations under the lease should he depart before the one-year lease period expired. Defendant was questioned whether it was his intention to live in the apartment when he signed the lease, and he responded, "I was going to move in there, yes." Although he had not changed his voter registration or driver's license before moving out two months later, he had taken his clothing to the apartment, his mail was delivered to the apartment, phone service was connected, and defendant slept at the apartment. We acknowledge that defendant also testified that it was not his intention to stay in the Saginaw County apartment; however, when asked why he left the complex, defendant stated, "I just decided to move in with my mother. My mother was living by herself, and I just didn't care to pay the rent." This explanation suggests that his proclaimed intention not to remain in the apartment developed at around the time he moved out and was not representative of his intention upon first moving into the apartment and at the time the complaint was served. Regardless of defendant's subjective assertions of his intent, the lease agreement speaks volumes and is indicative of an intent to reside in the apartment at the relevant time. The lease reflects objective evidence of intent that we find more compelling than defendant's self-serving testimony. Accordingly, we find no error in the trial court's ruling that the residency requirement of MCL 552.9(1) was satisfied and that the court thus had jurisdiction to entertain the divorce action and enter judgment.²

II. Property Division, Valuation, and Award of Alimony in Gross

Defendant presents numerous arguments asserting error relative to the trial court's factual findings and legal conclusions with respect to the valuation and division of the parties' property.

In *Gates v Gates*, 256 Mich App 420, 422-423; 664 NW2d 231 (2003), this Court, referencing the standards applicable for appellate review of rulings regarding property division and valuation of assets, stated:

In reviewing a trial court's property division in a divorce case, we must first review the trial court's findings of fact. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997), citing *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). "If the trial court's findings of fact are upheld, [we] must decide whether the dispositive ruling was fair and equitable in light of those facts. The dispositional ruling is discretionary and should be affirmed unless [we are]

² Defendant's reliance on *Lehman v Lehman*, 312 Mich 102; 19 NW2d 502 (1945), is misplaced because in *Lehman*, the plaintiff admitted that he went to Chippewa County to merely visit his parents at which time he filed suit, despite the fact that the parties had been married and resided in Wayne County. The Michigan Supreme Court declared that neither party was a resident of Chippewa County and that the Chippewa Circuit Court lacked jurisdiction to enter a divorce decree. *Id.* at 106-107. Here, defendant was not visiting Saginaw County but had signed a lease and was residing in an apartment.

left with the firm conviction that the division was inequitable.” *Id.* at 429-430, citing *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993)

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.* [Alterations in original.]

Defendant first argues that the trial court erred in failing to realize that his partnership interest in the farming operation constituted only 27.5 percent; therefore, the court erred in valuing the partnership and thus the marital estate. Defendant maintains that the court erred in finding that the partnership simply gave away \$1,177,000, in finding that the sales price was quite a windfall for the purchasers, and in finding that defendant received an inflated price, \$469,156, on the sale of his partnership interests.

The inquiry regarding which assets comprise the marital estate is distinct from the question of the valuation of those assets. *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997). A trial court must make specific findings regarding the value of property being awarded in a judgment. *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003). For purposes of dividing property, marital assets are typically valued at the time of trial or the time judgment is entered, although the court may, in its discretion, use a different date. *Byington, supra*. A court commits error when it fails to value a business interest. *Steckley v Steckley*, 185 Mich App 19, 23; 460 NW2d 255 (1990).

Although the trial court may have made a misstatement regarding the partnership while rendering an extensive ruling from the bench, we find no basis for reversal. When the court stated that the partnership simply gave away \$1,177,000 (the listed value of the commodities), it had evidently lost track of the fact that defendant had a limited interest, that two of the purchasers already held partnership interests, and that a downward adjustment for prior year profit withdrawal and taxes had been made to the initial value placed on the partnership by defendant and others. Yet, the trial court did not necessarily err in concluding that the purchasers received a windfall, where there was expert testimony by plaintiff’s CPA that the valuation process was improper, did not meet recognized standards for valuing assets for purposes of a sale, and placed an inappropriate emphasis on what the purchasers could afford. She opined that the succession transaction was part sale and part gift. Plaintiff’s CPA could not place an actual value on defendant’s interests in the partnership and corporation as she did not perform an independent valuation. There was conflicting expert as well as lay testimony regarding the validity of the transaction, the soundness of the valuations, the methods used to value the business entities, and the appropriateness of discounting. In divorce actions, the trial court “has the best opportunity to view the demeanor of the witnesses and weigh their credibility.” *Stoudemire v Stoudemire*, 248 Mich App 325, 339; 639 NW2d 274 (2001). This Court gives special deference to a trial court’s findings when based on the credibility of witnesses. *Draggo, supra* at 429. We are not prepared to conclude that the court erred in finding that the purchasers received a windfall.

Next, and more importantly, we review the court's valuation of defendant's partnership interest. The trial court noted in its ruling that defendant's interest in the partnership equaled 27.5 percent,³ and, ultimately, the court valued defendant's interest in the partnership as being the equivalent of the face value of the two partnership notes⁴ (\$469,156), which defendant received as the consideration for his partnership interest.

Defendant argues that the court should have valued his partnership interest by calculating the dollar amount that reflects 27.5 percent of \$1,276,000 (\$350,900) and that the court was mistaken in finding that defendant received an inflated price for his interest. We cannot conclude that the court clearly erred in valuing defendant's partnership interest at \$469,156. There was a rational basis for this calculation, i.e., the two notes. While defendant maintains, in light of taxes, that the value of the two notes actually equals a smaller amount than their face value and is the equivalent of his 27.5 percent share of the \$1,276,000 total value, and thus defendant did not receive an inflated price, there was no testimony to bear this argument out and support defendant's position. In *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993), this Court stated that it is not an abuse of discretion per se for a trial court to decline to consider tax consequences when distributing marital assets. If, however, in the court's opinion the parties "have presented evidence that causes the court to conclude that it would not be speculating in doing so," it may consider the effects of taxation in distributing the marital assets. *Id.* Here, the lack of evidentiary support defeats defendant's argument.

Moreover, the amortization schedule for the partnership note that has a face value of \$133,456 reflects that, after consideration of interest payments, the total payment received will be \$203,335. This is approximately \$70,000 over the face value of the note and was not considered by the court. Furthermore, the trial court found that the partnership's total value was *at least* \$1,276,000. We additionally note that the succession plan has an open-ended provision that contemplates the payment of additional monies to defendant and Larry Zwerk should the farming operation outperform expectations. Finally, under the circumstances of this case, taking into account tax consequences flowing from the consideration provided to defendant pursuant to the succession transaction is highly suspect and would be inequitable, where the court found that the transaction was in essence a sham and an improper attempt to dissipate the marital estate. In our discussion below, we find no clear error regarding this conclusion by the trial court. Although we do not deny that payments on the notes may indeed have tax implications, without evidence of the extent of the tax burden and an explanation of the burden, and considering that one of the partnership notes accumulates interest, which was not considered, and that the court believed the transaction to be a sham and the total consideration given for the

³ This finding evidences the court's understanding that defendant's interest was indeed limited.

⁴ The partnership transaction included a promissory note and a "Guaranteed Payment Agreement." For ease of reference, and while understanding that there are distinguishing features, we shall refer to these documents as notes unless otherwise indicated.

partnership to be at the low end of its actual value, we cannot find error in the court's valuation of the partnership interest.⁵ There was evidence to support the court's finding of value.

Defendant next argues that the trial court erred in valuing the parties' real property when the court decided to value the corporation pursuant to the initial values calculated by defendant, his CPA, and the individuals purchasing the farming operation, instead of the actual consideration received by defendant as part of the sale and redemption of his shares in the corporation. The parties stipulated that approximately 551 acres of farmland had a value of \$1,051,790, which the court used in calculating the value of the marital estate. The corporation paid defendant for his shares, in part, by deeding real property held by the corporation, and defendant contends that this property is part of the 551 acres discussed above. Therefore, according to defendant, because the trial court treated the corporate transaction as if it had not occurred and valued the corporation presale, the valuation necessarily included the value of the real property held by the corporation that was subsequently deeded to defendant. But this property was also included in the valuation of the 551 acres of farmland. Hence, this real property was counted twice in the court's calculation of the total value of the marital estate.

Defendant testified that the corporation real estate that was transferred to him and Larry Zwerk as part of the family succession agreement, and which land was included in the court's valuation of the corporation, was land that was also part of the 551 acres to which the parties stipulated to value, which value was also included in the court's calculation of the marital estate. This land was the subject of the two September 2000 quitclaim deeds, the first of which transferred the property from the corporation to plaintiff and defendant jointly. The legal description is contained in the judgment of divorce as part of the real property awarded to defendant. Plaintiff argues that there was more farmland rent received in 1999 than in 2000, the year of the transaction, thus there could not have been an increase in farmland held by the parties as a result of the sale and therefore the 551 acres did not include the corporate real estate. This argument does not take into consideration that the annual December farmland rent payments are affected by crop yield and market prices. Although the record appears to support defendant's contention, we are not certain from our review whether the real estate was counted twice. Therefore, we remand the case to the trial court for a specific determination whether the 551 acres of land subject to the stipulation included the property that was transferred from the corporation and included in the corporation's value. If indeed the property was counted twice, the court is to recalculate the marital estate without twice counting the value of the one-time corporate property. Additionally, the court accepted the initial value placed on the corporation, which reflected that the real property held by the corporation had a value of \$400,000. The evidence at trial suggested that the property had a value of \$365,000. The record is unclear what value was placed on the property as part of the computation of the stipulated total value of the 551 acres. On remand, the trial court is to make a specific finding regarding the value of the property, and it then shall make the necessary adjustments in determining the total value of the

⁵ We additionally note that the succession plan states that a tax discount has already been applied in determining how much consideration would be paid to defendant for his interests.

marital estate and ultimately the amount to be awarded to plaintiff as alimony in gross pursuant to the sixty/forty division of the estate.

Defendant next argues that the trial court erred in disregarding the succession plan and treating defendant's interests as if the transaction never occurred. Defendant maintains that plaintiff never requested the court to disregard the succession plan, but instead sought a valuation premised on the consideration received, with the issue of the validity of the transaction and any damages flowing therefrom being decided in the Tuscola County lawsuit.

Where property or assets have been placed outside the marital estate as a device to avoid fair distribution, it will be considered a marital asset. See *Thames v Thames*, 191 Mich App 299, 309; 477 NW2d 496 (1991); *Wiand v Wiand*, 178 Mich App 137, 146-148; 443 NW2d 464 (1989); see also 2 Michigan Family Law, Property Division, § 15.21. Where a party has dissipated marital assets without fault on the part of the other spouse, the value of the dissipated assets may nonetheless be included in calculating the marital estate. See *Everett v Everett*, 195 Mich App 50, 56; 489 NW2d 111 (1992); see also Michigan Family Law, *supra*.

We cannot conclude that the trial court clearly erred in treating defendant's interests as if the transaction was a sham and had never occurred. Although there was evidence presented suggesting that execution of the succession plan in 2000 was appropriate, there was also evidence that could reasonably be interpreted as being to the contrary. This evidence included the actual timing of the agreement in relation to the breakdown of the marriage, the backdating of instruments utilized to complete the transaction, the questionable nature of the valuations, discounts, and sales price as indicated by the testimony of plaintiff's CPA, the lack of knowledge and consent concerning the transaction as alleged by plaintiff (a stockholder), the voiding of stock held jointly by defendant and plaintiff, and the circumstances regarding the execution of the September 26, 2000, quitclaim deed.

With respect to the valuation of the corporate interest and the conflicting testimony on the subject, we note the following language found in this Court's opinion in *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994):

The valuations of the parties' experts varied widely and were the subject of much dispute at trial. The trial court made its own evaluation on the basis of all the evidence presented, and, while some of the trial court's individual determinations may have been miscalculated, the court's valuation was within the ranges established by the testimony. A trial court has great latitude in determining the value of stock in closely held corporations, and where a trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present. *Rickel v Rickel*, 177 Mich App 647, 650; 442 NW2d 735 (1989); *Pelton v Pelton*, 167 Mich App 22, 25-26; 421 NW2d 560 (1988).⁶

⁶ This Court in *Kowalesky v Kowalesky*, 148 Mich App 151, 154-155; 384 NW2d 112 (1986), stated that neither a Revenue Ruling, which contained a valuation method to value the stock of
(continued...)

Here, the trial court relied on initial value calculations reached by defendant, Larry Zwerk, defendant's CPA, and the purchasers. The trial court additionally accepted the testimony of plaintiff's CPA regarding the validity of the discounts, while rejecting the testimony of defendant's CPA. Although the court questioned, because of the testimony of plaintiff's CPA, the validity of even the initial values as provided in the succession plan, the court decided to utilize those values. As such, the court's valuation of the corporate interest was within the range established by the proofs. Accordingly, there was no clear error. The evidence presented by defendant regarding the discounts was questionable. The succession plan provided for tax and inter-family discounts that reduced the initial values given to the business entities. The testimony at trial by defendant's CPA did not explain how the particular tax discount amount was reached. Moreover, defendant's CPA testified as to further discounting mainly because of the volatility of farming, yet the succession plan speaks only of an inter-family discount. Plaintiff's CPA explained that farming volatility, while a reality, does not relate to discounts but should be considered in an initial value calculation after viewing the history of income flow and profits. See Michigan Family Law, *supra* at § 15.36. Additionally, any family discount here was essentially a gift according to plaintiff's CPA. Defendant cites no authority for the proposition that a "family" discount should be considered in valuing an asset for purposes of property division in a divorce action. Defendant himself testified that the price was set at an amount that would be affordable for the "boys." Assuming that the family discount related to marketability, there was no evidence on how the amount of the discount was derived because of marketability issues, and defendant's CPA acknowledged that marketability did not really play any role here when it came to the discount. Reversal is unwarranted.

With respect to the argument that plaintiff never asked the trial court to disregard the transaction, but rather asked the court to leave the issue pertaining to the validity of the transaction for the Tuscola County litigation, we fail to see how this would require reversal. It is true that some of the statements below by plaintiff's counsel indicated a desire for the court to divide only the consideration received by defendant in the transaction; however, plaintiff testified that she wanted the court to make a decision as if the transaction had never occurred. Moreover, there was extensive evidence about the questionable nature of the transaction. Even if a party does not specifically request certain relief, or even if the party requests relief contrary to that subsequently ordered, it does not result in the court being divested of its equitable authority to grant the relief the court's deems just and proper.

Defendant next argues that the trial court erred in disregarding the succession plan and accompanying transaction because the court did not have the authority to adjudicate the rights of third parties, i.e., the group of young relatives acquiring interests in the farming operation. Defendant asserts that the trial court could not rule that the succession plan violated plaintiff's shareholder rights; this was the subject of the Tuscola County litigation.

(...continued)

closely held corporations for estate and gift tax purposes, nor any other single method should uniformly be applied in valuing a professional practice. "Rather, this Court will review the method applied by the trial court, and its application of that method, to determine if the trial court's valuation was clearly erroneous." *Id.* at 155-156.

As a general principle, a family law court has no authority to adjudicate the rights of third parties in divorce actions. *Thames, supra* at 302. An exception to the general rule exists where a third party has conspired with one spouse to deprive the other spouse of an interest in the marital estate. *Id.* A court has the authority to find that assets were fraudulently transferred to a third party to deprive a spouse of an interest in marital property. *Id.*

Here, the trial court did not adjudicate the rights of third parties. Rather, the court merely decided to value the marital estate as if the succession transaction did not take place after questioning the validity of the transaction. The court's decision related solely to setting a dollar amount for purposes of property division. The trial court did not actually void the transaction, nor issue an order that required the purchasers to surrender any of their rights under the succession transaction. The trial court did not award plaintiff any interest in the corporation that would interfere with the purchasers' right to run the business. The court's ruling only impacted how much defendant would have to pay plaintiff in the property distribution. Defendant's argument lacks merit.

Defendant next argues that the trial court erred by failing to take into account his premarital equity in the marital home at the time the parties married in 1972. In a similar vein, defendant argues that the court erred in not considering the value of his premarital equity in the farm entities that he acquired prior to marriage or by gift from his parents. Both claims fail for lack of sufficient evidentiary support.

Equity accumulated by a spouse with respect to property owned before a marriage represents separate property to which that spouse is normally entitled. *Korth v Korth*, 256 Mich App 286, 291-294; 662 NW2d 111 (2003)(husband's premarital down payment and appreciation in a home remained his separate property even though he placed his wife's name jointly on deed); *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). We do note, however, that MCL 552.23 and MCL 552.401 permit a court to award one spouse's separate property to the other spouse, or treat it as marital property, if an award to the claimant spouse out of the marital assets is insufficient for the suitable support and maintenance of the claimant, or when the claimant spouse contributed to the acquisition, improvement, or accumulation of the property. *Reeves, supra* at 494-495.

Regarding the marital home, the parties stipulated that it had a market value of \$150,000. There existed a debt on a loan made by defendant's mother in the amount of approximately \$20,000 and an equity loan in the amount of \$39,829. The trial court determined that the current equity in the home equaled \$90,173, and this value was used by the court in calculating the marital estate. The trial court observed that defendant had testified that the home was worth \$80,000 at the time of marriage. Our review of the testimony reveals that defendant testified that he believed that he had \$80,000 in equity in the marital home at the time of marriage. The trial court did not lower the \$90,173 value it had placed on the house for any alleged premarital equity defendant may have had in the home. Defendant maintains that the \$80,000 represents premarital equity for which he should have been given credit.

Unlike the premarital equity that the trial court credited to defendant in regard to the three parcels acquired by defendant and his brother jointly before the marriage, there was no documentary evidence whatsoever to support defendant's vague reference that he had \$80,000 in equity in the home at the time of marriage. There was evidence of a loan made by a relative of

defendant's first wife that was used for construction of the home. The testimony indicated that the loan was in the neighborhood of \$30,000, with an expectation of repayment at the time the parties married. The loan was subsequently forgiven by the relative because plaintiff cared for the relative prior to death. The record does not reveal if this loan played into defendant's claim that he had \$80,000 in equity. Defendant cites only his testimony that he had \$80,000 in equity. The record on this matter is simply too vague. There was no explanation how defendant arrived at this amount.

Turning to the issue of premarital equity in the farming entities, we note that the corporation was not formed until 1976, and the record is unclear when defendant initially obtained his partnership interest. Regardless, the record is devoid of any evidence relative to the value of any business interests defendant may have held in 1972. Plaintiff testified that defendant owned some farm equipment at the time the parties married; however, there was no testimony or evidence regarding the value of the equipment or whether the equipment remains in use or whether it even still exists. Defendant fails to cite a transcript page or reference an exhibit to the contrary. We find no error on the trial court's part for not recognizing premarital equity in business entities and farming equipment when the evidence did not allow for such recognition.

Defendant next argues that the trial court erred, in valuing the marital estate, by failing to consider the tax consequences on receipt of defendant's cash flow coming from the notes and farmland rent. Defendant asserts that the effect of income and capital gains tax is real and that a substantial adjustment in the valuation is necessary to fairly reflect the true value of the notes as was done with respect to the profit sharing plan, which was valued net of taxes.

Typically, a trial court should take into consideration tax consequences when valuing a marital estate. *Everett, supra* at 55. Under certain circumstances, however, a court need not consider tax implications. *Hanaway v Hanaway*, 208 Mich App 278, 300-301; 527 NW2d 792 (1995); *Nalevayko, supra* at 164.

We have already rejected defendant's tax argument in relation to the partnership notes, and that same reasoning applies equally to the \$300,000 corporation note. Furthermore, the corporate note also accumulates interest, and the amortization schedule reflects that when the note is paid in full, defendant shall have received \$457,082. Moreover, the court did not value the corporation on the basis of the corporate note but rather on the basis of the higher values calculated by defendant and others in the family succession plan before discounting. Defendant takes issue with the court's decision to consider the tax consequences of the profit sharing plan but not the notes, but there was specific, detailed evidence regarding the tax impact on the plan and the plan was not part of the questionable succession plan. Defendant cites a few pages of transcript where he asserts that his CPA offered substantial evidence concerning the tax effect of future payments on the notes. Our review of these pages shows nothing more than a discussion of the nature of the three notes and general observations about taxes without any details and figures. Defendant's motion to reopen proofs runs contrary to his argument here, where in the motion he claimed that the CPAs failed to provide testimony regarding the tax consequences of the notes.

Concerning the farmland rent, there was also a lack of evidentiary support. Regardless, the trial court considered these rental payments in connection with income streams and spousal

support, and any spousal support payments will be deductible by defendant and taxed as gross income for plaintiff. See IRC 215 and 71. We find no error.

Finally, defendant argues that the court clearly erred by not considering all of the relevant property division factors, by focusing only on fault, and by concluding that marital misconduct by one party, in and of itself, is sufficient to justify punishing that party by way of an unequal division of property. Defendant also contends that divergence from an equitable distribution must be explained clearly by the court, and the court failed to do so here.

To reach an equitable division, the trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station or status in life, each party's earning ability, each party's age, health, and needs, fault or past misconduct, the cause for divorce, and general principles of equity. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996); *Sparks, supra* at 158-160. The determination of relevant factors will vary with the circumstances of each case, and no one factor should be given undue weight. *Id.* at 159-160. The trial court must make specific findings regarding the factors it determines to be relevant. *Id.* There will be cases where some, or even most, of the factors will be irrelevant. *Id.* at 159.

We first disagree with defendant's contention that the court did not consider all of the relevant property division factors. The trial court's ruling specifically addressed, or at least touched upon, the duration of the marriage, the contributions of the parties to the marital estate and the marriage, each party's status in life, the parties' earning abilities, each party's age, health, and needs, fault and misconduct, the cause for the divorce, and equity. Indeed, the trial court is to be commended, not reversed, for a thorough opinion.

The court's focus was not only on fault as the court explored all the relevant details about the couple's history, their individual characteristics, the business entities, the succession transaction, the property, incomes, and the parties' futures. The court ultimately viewed matters of fault, misconduct, the length of the marriage, plaintiff's commitment to the marriage, and equity as supporting a sixty-percent distribution in favor of plaintiff. Contrary to defendant's assertion, the trial court clearly explained its divergence from a fifty/fifty division. The goal is an equitable distribution, which is not always an equal distribution. See *Sparks, supra* at 159.

Defendant cites *Sands, supra*, for the proposition that marital misconduct does not justify punishing the offending spouse. The *Sands* Court, however, affirmed this Court's ruling that the trial court erred in dividing the marital assets equally, where the defendant husband attempted to conceal assets of the marital estate. In *Sparks, supra*, the trial court found that the plaintiff's sexual infidelity and desire to get out of the marriage caused the breakdown of the marriage, and the court awarded seventy-five percent of the property to the defendant. This Court affirmed, but our Supreme Court reversed, holding that the award was inequitable because disproportionate weight was ascribed to fault. *Id.* at 144-145. Here, the division was sixty-forty and cannot be described as inequitable; the trial court ascribed proportionate weight to fault and considered all of the relevant property factors.

In *Hanaway, supra*, the trial court also divided the marital estate sixty to forty percent, where the spouse, who was awarded the smaller share, was guilty of an extramarital affair. This Court noted that the trial court is in the best position to determine the extent to which the parties'

activities caused the breakdown of the marriage. *Id.* at 297. The *Hanaway* panel also stated that the trial court had considered fault, along with addressing the other property division factors. *Id.* This Court concluded, “While we would not have penalized plaintiff to the extent of a twenty percent differential in the property distribution, we are unable to say that the distribution was inequitable on this ground alone.” *Id.* Likewise, we find no error here.

III. Spousal Support

In regard to spousal support, defendant first argues that the trial court erred in not determining the level of plaintiff’s need and by not making a specific finding regarding defendant’s ability to pay. Defendant claims that he should not have to dissipate his property through mortgaging and sale to pay support just as the trial court found that plaintiff should not have to dissipate her assets – alimony in gross award – to survive. Defendant maintains that the trial court should have taken into consideration the fact that plaintiff was being awarded 1.4 million dollars, which, even if reduced somewhat as argued by defendant, is more than sufficient to survive comfortably. An award of spousal support was simply not necessary here according to defendant. He further argues that the award was not equitable because it was not practical in light of the financial reality facing defendant following execution of the succession plan. Next, defendant contends that the trial court clearly erred in finding that plaintiff should be treated as a retiree as there was no evidence to support this conclusion. Likewise, there was no evidence that defendant would farm until he died as found by the trial court. Finally, defendant asserts, as he did in relation to the property division, that the court erred in not taking into consideration that tax consequences of monies flowing from the notes and the farmland by way of rent.

An award of spousal support is left to the trial court’s discretion, and this Court reviews the award for an abuse of discretion. *Gates, supra* at 432. On appeal, the trial court’s factual findings relative to spousal support are to be reviewed for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). The findings are presumptively correct and the burden is on the appellant to show clear error. *Gates, supra* at 432. A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been made. *Id.* at 432-433. If the trial court’s findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts. *Id.* at 433. The trial court’s decision as to spousal support must be affirmed unless this Court is firmly convinced that it was inequitable. *Id.*

MCL 552.23(1) provides:

Upon entry of a judgment of divorce . . . , if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party . . . , the court may further award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

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, and spousal support is to be based on what is just and reasonable under the circumstances of the case. *Moore, supra* at 654. Among the factors

which should be considered are: (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, supra* at 631.

Here, we first reject defendant's argument that the trial court erred in not determining the level of plaintiff's need and by not making a specific finding regarding defendant's ability to pay. The trial court specifically addressed plaintiff's need by observing that her current pay was approximately \$13,000 a year, that she was fifty-eight years old with ulcerative colitis, making her job difficult, that she should not have to return to her part-time job because of her age and health, that the parties had a history of taking nice trips that would be ending, that defendant had to go out and find a new home, that plaintiff will probably receive much less social security income than defendant, and that any spousal support will be deductible to defendant while being taxed as income for plaintiff. The trial court admitted into evidence plaintiff's monthly budget showing costs of \$5,682, which included such items as housing costs, car payments, and medical insurance.

Regarding defendant's ability to pay, the trial court found that he would have income of about \$95,000 a year flowing from his salary and the farmland rent and that he would receive more than plaintiff in social security. Also, the court recognized that, pursuant to the language in the succession agreement, the corporation would continue providing defendant health insurance, medical reimbursement, and a retirement plan. Plaintiff's total annual spousal support, before taxes, equals \$31,500, about one-third of defendant's income. Plaintiff's budget exceeds the spousal support award. The court considered need and the ability to pay as well as the other spousal support factors enunciated in *Olson, supra*.

Defendant argues that he should not have to dissipate the property awarded to him in order to pay spousal support. First, defendant has his \$30,000 salary that is not affected by his property holdings. Although the farmland rent is received via his ownership interest in the property as awarded by the court, he will not lose this rent by encumbering the property with mortgages. To some degree, mortgaging would be expected where almost all of the property interests were awarded to defendant and where there was no large cash reserve. In an admittedly overly simplistic example, if the assets of a hypothetical marital estate consisted solely of real property with an equity value of \$2,000,000, and one party was awarded the property, an equal division would require the spouse, who was awarded the property, to pay the other spouse \$1,000,000. The payer spouse would mortgage the property to obtain a \$1,000,000 loan to pay the other spouse. This would leave the payee spouse with \$1,000,000 in cash and the payer spouse with \$1,000,000 of equity in the property; an equal division. The mortgage payments to the bank would be comparable to paying the other spouse the \$1,000,000 in monthly installments. By analogy, the same could be expected in the case at bar.

The problem that developed here is that defendant did not actually receive, as consideration under the succession plan, the value attributed to the corporation by the trial court. Furthermore, there was a sixty to forty percent division of the marital estate. Additionally, some

of the consideration received in the succession transaction involved structured payments over time by way of notes. However, we found no clear error in the court's valuation, the sixty to forty percent distribution, and its finding that the transaction was improper; therefore, defendant must live with the value he actually received in the transaction and the court's distribution. The "financial reality" faced by defendant is of his own doing. Moreover, we again take note that the succession plan has an open-ended provision that contemplates the payment of additional monies to defendant and Larry Zwerk should the farming operation outperform expectations.

We recognize that plaintiff received a 1.4 million dollar alimony in gross award, which might be reduced somewhat relative to the remand issue concerning whether some property was counted twice, but this number reflects a division of the marital property and did not contemplate the parties' cash flows from employment and rent. In *Hanaway, supra* at 296, this Court stated that, where there are substantial assets awarded, the court, in evaluating a claim for alimony, "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." Under this approach, if one considers the alimony in gross award an asset, the value of the asset should not be evaluated for purposes of spousal support, but rather the income-producing potential of the asset should be considered. Clearly, with sound investment, the million-dollar-plus award received by plaintiff should reap financial gains. But it must be remembered that the real estate awarded defendant will, in all likelihood, appreciate in value and that the current income flows favor defendant. We cannot conclude that the court erred in attempting to meet the objective of balancing the incomes and needs of the parties.

Defendant argues that there was a lack of evidentiary support for the court's findings that plaintiff should be treated as a retiree and that defendant would farm until he died. Considering plaintiff's age, her health, and her background of not being employed outside the home, of which there was evidence, we find no error with the court's finding. Further, even if plaintiff's income as a part-time LPN is considered, the income was minimal and typical retirement age is soon approaching. The spousal support award could still not be deemed error under those circumstances. With respect to defendant working until he died, there was evidence that he was healthy and working on the farm, and a lack of evidence that he planned to retire from farming any time soon. Additionally, the \$30,000 salary provision of the succession agreement, without an end date, suggests that defendant plans to work indefinitely. We find no error in the court's fact-finding, and we point to our discussion below regarding the "non-modifiable" support provision of the judgment on chance that defendant decides to stop farming.

Finally, regarding defendant's tax-implication argument, we have already addressed and rejected the claim.

Although not raised by the parties, we reverse, *sua sponte*, that portion of the judgment of divorce that provides that the monthly spousal support award is "non-modifiable for life." This provision is simply not consistent with Michigan law. MCL 552.28 allows for the modification of a spousal support award. In *Staple v Staple*, 241 Mich App 562, 569; 616 NW2d 219 (2000), this Court stated that "MCL 552.28 . . . will always apply to any alimony arrangement adjudicated by the trial court when the parties are unable to reach their own agreement." See also *Gates, supra* at 433. The judgment of divorce provision at issue here was adjudicated by the court and not the subject of an agreement by the parties. Accordingly, the trial court was not

entitled to make the spousal support award non-modifiable. This provision of the judgment is to be stricken on remand.

IV. Request to Reopen Proofs on Tax Issues

Following the presentation of proofs, but before the trial court rendered its ruling from the bench, the parties discovered that they had inadvertently failed to admit into evidence the three notes at issue. There was, however, a great deal of testimony regarding the notes. Through a stipulation and order, the notes were admitted into evidence and considered by the trial court. The court had the parties submit written summaries addressing their understanding of the notes. Defendant moved to reopen proofs in an effort to provide supplemental testimony by his CPA, as well as plaintiff's CPA, that would explain and clarify the various instruments and the tax consequences arising out of the notes. The trial court denied the request. Defendant argues that the court abused its discretion in failing to reopen proofs because the tax implications were critical to a proper resolution of this case and the court had shown some confusion on the matter. We decline to reverse the trial court on this issue.

This Court reviews a decision on a motion to reopen proofs for an abuse of discretion. *Bonner v Ames*, 356 Mich 537, 541; 97 NW2d 87 (1959); *Hunt v Freeman*, 217 Mich App 92, 100; 550 NW2d 817 (1996). An abuse of discretion is only found if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the court's ruling, *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

The court controls the mode and order of interrogating witnesses and presenting evidence. MRE 611(a). In determining whether proofs should be reopened, a court typically needs to consider whether the adverse party would be surprised, whether there would be inconvenience to the court, parties, or counsel, and whether there would be prejudice or deception of any kind in reopening the proofs. *Bonner, supra* at 541. On the issue of a trial court's ruling regarding the reopening of proofs, "this Court's attitude has generally been one of noninterference." *Knoper v Burton*, 12 Mich App 644, 648; 163 NW2d 453 (1968), rev'd on other grounds 383 Mich 62; 173 NW2d 202 (1970).

While there would most likely be little surprise, inconvenience, or prejudice had the trial court reopened the proofs, we find no abuse of discretion because defendant presented no reasonable excuse for failing to present the evidence during the trial. In defendant's motion to reopen proofs, he simply claimed that the failure to present CPA testimony on tax ramifications in regard to the notes was an "oversight."

In *Potts v Shepard Marine Constr Co*, 151 Mich App 19, 25-26; 391 NW2d 357 (1986), this Court, addressing the analogous situation of a plaintiff requesting to recall a witness to the stand to review business records, rejected the plaintiff's appeal of the denial of the request because, in part, the plaintiff already had an opportunity to fully examine the witness as to the business records and the plaintiff's request appeared to be a mere afterthought. The *Potts* panel stated that the testimony sought was not vital to the plaintiff's case in that it would not establish a necessary element to the cause of action; the denial of the request did not cut the heart out of

the plaintiff's case. *Id.* at 26. Our Supreme Court, in the context of a motion to reopen proofs based on newly discovered evidence, declined to find an abuse of discretion because the request failed to show that it was meritorious and that reasonable diligence had been exercised. *Cowan v Anderson*, 184 Mich 649, 656; 151 NW 608 (1915). Here, we are not even talking about a claim of newly discovered evidence.

Defendant was fully aware of the notes' existence before and during trial and that the notes would be part of the evidence regarding the partnership and corporation, thereby potentially affecting the division of the marital estate and spousal support. The notes would be awarded to one of the parties. Defense counsel, no doubt, was also aware that valuation plays an important role in any divorce trial and that tax implications can be considered by the court. There was no impediment to defendant examining his CPA, or cross-examining plaintiff's CPA, relative to the tax consequences of the notes. Moreover, at the request of the trial court, defendant, as well as plaintiff, submitted briefs explaining the notes to the court, which touched on tax implications. After review of the parties' briefs, the court found it unnecessary to hear further testimony from the CPAs before proceeding with its ruling. We are not prepared to rule that the court abused its discretion.

Furthermore, it cannot be said that the failure to reopen proofs cut the heart out of defendant's case. In defendant's brief explaining promissory notes, he asserted that the corporate note is subject to capital gains tax over a period of years and that the value of the note should be adjusted downward by \$50,000. However, the corporation was not even valued by the court on the basis of the \$300,000 corporate note but rather on the basis of the higher values calculated by defendant and others in the family succession plan before discounting. Additionally, the trial court did not consider the payments on the notes in determining the dollar amount to award plaintiff in spousal support. With respect to the partnership note, defendant argued in his lower court brief that the CPA would testify that "there is no capital gains tax due on those monies since they are prior profits retained by the partnership and have already been taxed." Taking into consideration the court's finding that the succession transaction was a sham, we fail to see why a court should consider tax ramifications of notes received as part of the sham transaction. There was no abuse of discretion in denying defendant's motion to reopen the proofs.

V. Trial Court Jurisdiction to Render Order on Motion for Reconsideration Pending Appeal

On December 13, 2002, the trial court rendered its ruling from the bench. A judgment of divorce was not entered until January 28, 2003. Several proposed judgments had been submitted giving rise to various objections. One of the proposed judgments submitted by plaintiff contained a provision that the annual farmland rental payments from 2001 and 2002 were to be divided equally between the parties. Defendant objected, arguing that the trial court made no such ruling and that the rental payments, and any future rental payments, had already been considered by the court in viewing income flow and in setting the monthly spousal support award. The trial court agreed with defendant's assessment and did not allow for the requested provision to be included in the judgment of divorce.

Plaintiff filed a motion for reconsideration on the issue on January 22, 2003. Before any decision on the motion was reached, the judgment of divorce was entered. Subsequently, after various other postjudgment motions were resolved, defendant filed a claim of appeal on March

26, 2003, with this Court. On November 12, 2003, the trial court entered an order granting the motion for reconsideration under MCR 2.119(F). The court opined that plaintiff had demonstrated palpable error by which the court or parties had been misled. The trial court found that the 2002 farmland rent was marital property and should have been part of its ruling on December 13, 2002. The court concluded, "Plaintiff is entitled to half of the rents earned in 2002 received by Defendant relative to the 552 acres of farm land." Plaintiff submitted a proposed first amended judgment of divorce incorporating the court's ruling on the motion for reconsideration. On December 9, 2003, defendant filed an objection to the proposed judgment, arguing that the court lacked the authority and jurisdiction under MCR 7.208(A) to amend the judgment of divorce, given that a claim of appeal in regard to the original judgment had already been filed with this Court.

On January 16, 2004, the trial court entered an order entitled, "Order Granting Relief Under Motion for Reconsideration Regarding 2002 Land Rent." The order provided that defendant was to pay plaintiff \$42,071, which represented one-half of the farmland rent received by defendant in 2002. The order also provided that the \$42,071 "is awarded as property settlement in addition to the alimony in gross awarded in the Judgment of Divorce dated January 28, 2003." Further, "the amount of the alimony in gross is an additional adjustment to equalize the equities of the known values of the parties['] real and personal property as determined by the Court."

Defendant argues that the trial court lacked jurisdiction to grant the motion for reconsideration, which defendant argues effectively amended the judgment of divorce, because a claim of appeal had been previously filed challenging the terms of the original judgment of divorce. Defendant maintains that MCR 7.208(A) did not permit the court to amend the judgment.

MCR 7.208(A) provides in pertinent part:

After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except

- (1) by order of the Court of Appeals,
- (2) by stipulation of the parties,
- (3) after a decision on the merits in an action in which a preliminary injunction was granted, or
- (4) as otherwise provided by law.

Plaintiff argues that the trial court did not violate MCR 7.208(A) because the judgment of divorce never mentioned the 2002 land rent. Therefore, there was no amendment of the judgment. Assuming there was a lack of jurisdiction, plaintiff urges this Court, as a matter of judicial economy, that it should consider the merits of the trial court's ruling. Defendant himself maintains that we should substantively address the merits of the court's ruling as a matter of judicial economy and finality. Assuming, on our part, that the postjudgment order reflects an

amendment of the judgment of divorce for purposes of MCR 7.208(A), we agree that it is proper for us to address the merits of the order.

The filing of a claim of appeal divests the circuit court of its jurisdiction to amend its final orders and judgments. *Wilson v Gen Motors Corp*, 183 Mich App 21, 41; 454 NW2d 405 (1990); *Vallance v Brewbaker*, 161 Mich App 642, 647-648; 411 NW2d 808 (1987). The remedy for violation of MCR 7.208(A) is to reverse the trial court's order without prejudice to the moving party's right to renew the issue that gave rise to the order. *Wilson, supra* at 41; *Vallance, supra* at 648. Concerns regarding judicial economy and finality leave us hesitant to simply reverse and put off for another day resolution of the merits of the issue as it is likely on remand that plaintiff would renew the issue and the court would rule in a manner consistent with its previous ruling. We conclude that it is proper to consider the substantive merits of the court's ruling because the parties agree to having us address the merits. As noted above, MCR 7.208(A) allows a trial court to amend a judgment after a claim of appeal is filed "by stipulation of the parties." While we recognize that this provision is not directly on point because the parties did not stipulate to any amendment before or at the time of the amendment, the parties have now essentially stipulated to the court's act of entering the postjudgment order, although there is no agreement regarding the legal soundness of the substance of the order. We now turn to the substance and merits of the trial court's ruling to determine if it should be affirmed or reversed.

VI. Motion for Reconsideration – Merits

Defendant's argument is that the trial court's treatment of the rent received for leasing the farmland focused on its nature as "income" to be considered in relation to setting the award of spousal support and not as a "property interest" subject to division. Indeed, the trial court initially admitted as much in agreeing with defendant's objection to plaintiff's proposed judgment. Plaintiff maintains that the court did not consider the December 2002 rent in its ruling because it had not yet been received, but it was received before a judgment was entered and before the award of spousal support became effective; therefore, the court had the discretion to treat the rent as property subject to division.

Before trial, defendant was paying \$3,000 per month in temporary spousal support. The judgment of divorce provided that the payment of \$2,625 in monthly support became effective on February 1, 2003, with the temporary support award terminating on the date the judgment was signed, January 28, 2003. A review of the transcript of the de novo hearing concerning temporary spousal support, held in January 2002, does not reveal the basis or reasoning with respect to why the court ordered \$3,000 per month in temporary support, which defendant was paying when the 2002 rental payment was received. While it is clear from the record that, in regard to the award of spousal support, the court looked to the future income stream that defendant would be receiving after the divorce generated by the farmland awarded to defendant, it had not specifically found that the future rents included the 2002 rent that was received before the judgment of divorce and the spousal support award even became effective. As the judgment of divorce was yet to enter, the 2002 rent was received at a point in time when the real property still remained a marital asset. In *Byington, supra* at 110, this Court concluded that a compensation package earned before entry of the judgment of divorce was marital property and properly considered part of the marital estate. Here, the rental payment was earned and received before the judgment dissolving the marriage was entered, without a specific finding that this particular rental payment should be considered only as income for purposes of determining

spousal support. We find no abuse of discretion by the court in treating this single rental payment as property subject to division.⁷

VI. Conclusion

In conclusion, we hold that the trial court did not err in regard to the ruling regarding jurisdiction to entertain the divorce action, that the court did not err in regard to the award of spousal support, except for the provision making the award “non-modifiable,” and that the court did not err in regard to the property division and the award of alimony in gross, except possibly as to valuation where it may have counted some real property twice, which matter will be taken up on remand. Further, the court did not err in denying defendant’s request to reopen proofs, and the court’s postjudgment ruling on the motion for reconsideration can be addressed and affirmed.

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

/s/ William B. Murphy

/s/ Helene N. White

/s/ Kirsten Frank Kelly

⁷ Defendant argues that the motion for reconsideration and the orders on the motion should not have been considered under MCR 2.119(F) because the rule speaks of challenges to an order “on a motion” and not a request to reconsider a judgment that the court entered. Instead, defendant asserts that the proper procedure would have been to utilize MCR 2.610-2.612, which address challenges to judgments. Defendant states that he only points this out as he was deprived of an opportunity to respond to the motion under MCR 2.119(F) as opposed to the rules regarding judgments that allow for a response to a motion. Defendant expresses that this argument does not form the basis of his request for a reversal of the court’s order. We note that, at the time plaintiff filed the motion for reconsideration, the judgment of divorce had not yet entered; therefore, there was technically no judgment to challenge. What plaintiff was challenging in the motion for reconsideration was the court’s agreement with defendant’s objection to the proposed judgment submitted by plaintiff. Nonetheless, an abuse of discretion standard applies regardless of which court rule is employed, and thus it is unnecessary to disentangle the procedures utilized below. See *Kokx v Bylenga*, 241 Mich App 655, 658-659; 617 NW2d 368 (2000)(decision on motion for reconsideration reviewed for an abuse of discretion); *McDonald’s Corp v Canton Twp*, 177 Mich App 153, 158; 441 NW2d 37 (1989)(ruling on motion to amend a judgment reviewed for an abuse of discretion); *Driver v Hanley (After Remand)*, 226 Mich App 558, 564-565; 575 NW2d 31 (1997)(determination whether to grant relief from judgment reviewed for an abuse of discretion).