

STATE OF MICHIGAN
COURT OF APPEALS

TINA MARIE BARNEY,
Plaintiff-Appellee,

UNPUBLISHED
December 4, 2007

v

ROBERT NELSON BARNEY,
Defendant-Appellant.

No. 271590
St. Joseph Circuit Court
LC No. 04-000876-DO

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce entered in this case on June 19, 2006, specifically challenging the trial court's denial of his motion to set aside the default, as well as the trial court's award of property and spousal support. We affirm.

We review for an abuse of discretion a trial court's decision with regard to a motion to set aside a default. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). An abuse of discretion is found if the trial court's decision falls outside of the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A motion to set aside a default or default judgment, except when based on a lack of jurisdiction over the defendant, is to be granted only if the movant shows good cause and files an affidavit demonstrating a meritorious defense. MCR 2.603(D)(1). Good cause can be shown by demonstrating a "reasonable excuse for the failure to comply with the requirements that created the default." *Saffian v Simmons*, 267 Mich App 297, 301-302; 704 NW2d 722 (2005).

Defendant averred that he "did not take full and complete part in this divorce action" for the reason that he "believed that [his] wife was never actually going to go forward with the divorce." The trial court found that defendant had a meritorious defense, noting that, due to the significant length of the marriage and substantial assets to be divided between the parties, the proceedings would benefit from having both parties participate. However, the trial court found that defendant's statement, that he did not believe plaintiff would follow through with the divorce, did not constitute good cause sufficient to warrant setting aside the default under MCR 2.603(D)(1). The trial court commented that parties proceed at their own risk when they decline to involve themselves in litigation under the mistaken assumption that the other party will dismiss the case. The trial court's finding that defendant failed to demonstrate the requisite good cause necessary to warrant setting aside a default under MCR 2.603(D)(1) did not fall outside of

the range of reasonable and principled outcomes. *Maldonado, supra* at 388. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to set aside the default.¹

“In reviewing a trial court's property division in a divorce case, we must first review the trial court's findings of fact.” *Gates v Gates*, 256 Mich App 420, 422-423; 664 NW2d 231 (2003). Findings of fact will not be reversed unless clearly erroneous. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* “Although this standard is less rigorous than the standard applied to a jury determination, it does not authorize the reviewing court to substitute its judgment for that of the trial court.” *Johnson v Johnson*, 276 Mich App 1, 11; ___ NW2d ___ (2007). “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.” *Gates, supra* at 423 (internal citation and quotation marks omitted). “The dispositional ruling is discretionary and should be affirmed unless [we are] left with the firm conviction that the division was inequitable.” *Id.* (internal citation and quotation marks omitted).

A judgment of divorce must include a determination of the property rights of the parties. MCL 552.19; MCR 3.211(B)(3); *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003). On appeal, defendant challenges the trial court's adoption of the value of the marital home as advanced by plaintiff's appraiser. Specifically, defendant challenges the comparables used by plaintiff's expert, who appraised the home at \$142,500, as opposed to that of defendant's expert, who appraised the home at \$106,000. The trial court determined that the appraisal advanced by plaintiff was more accurate and credible, and it valued the property accordingly. Plaintiff's appraiser explained in detail the method he used to determine the value of the marital home, and “where a trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present.” *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). Moreover, a trial court is in the best position to judge the credibility of the witnesses and has great latitude in arriving at a final valuation of a marital asset on the basis of divergent testimony about the asset's value. *Pelton v Pelton*, 167 Mich App 22, 25-26; 421 NW2d 560 (1988). “The trial court may, but is not required to, accept either parties' valuation evidence.” *Id.* at 25. The trial court's findings with regard to the acceptability of plaintiff's appraisal were not clearly erroneous, and the trial court did not err in adopting plaintiff's appraised value as the value of the marital home.

Defendant also argues that the trial court erred in disregarding the marital home's state equalized value (SEV) and the effect that this would have if the property ended in receivership. As noted above, the trial court had broad discretion in determining the valuation of property. *Id.* at 26. Both appraisers testified regarding the notorious inaccuracy of using state equalized values when attempting to determine the value of a marital home for property settlement

¹ As an aside, we note that defendant ultimately admitted all of the allegations in plaintiff's complaint and was also allowed by the trial court to participate in hearings involving the fairness and equity of the divorce judgment.

purposes in a divorce. Thus, we do not find that the trial court clearly erred in deciding not to use the SEV when determining the value of the marital home.

Defendant tangentially posits that the trial court “did not take into consideration the economic realities of the soft real estate market when it allowed the receiver language to remain in the judgment of divorce.” Defendant does not elaborate on this argument, and “[i]t is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (internal citation and quotation marks omitted). Further, a review of the trial court’s decision following the hearing reveals that the trial court specifically recognized that “recent trends in the real estate market have been somewhat downward in the area, as shown by Defendant’s exhibit and testimony.” In fact, the trial court noted that if it was assigning value at the time it wrote the decision, it would devalue the marital home by two percent to reflect the slight downward trend. However, the trial court found that it would be unfair to calculate the equity in the home based on a current valuation and that to do so would reward defendant because of a delay of his own making. Instead, the court fixed the equity as near as possible to the parties’ separation date. The proper time for valuation of an asset is within the discretion of the trial court, *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993), and no clear error is apparent.

Defendant also argues that the trial court erred in awarding plaintiff a four-wheeler vehicle, contending that it was his separate property. At the hearing, defendant testified that the vehicle was a gift to him from his brother and that he “wanted it back.” Plaintiff testified that she “had possession” of the vehicle. “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 v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). “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.” *Dart v Dart*, 460 Mich 573, 585; 597 NW2d 82 (1999). However, courts have the discretion to include property acquired by gift or inheritance in the marital estate where the separate property has been commingled with the marital property or used for joint purposes. See, e.g., *Charlton v Charlton*, 397 Mich 84, 94; 243 NW2d 261 (1976), and *Pickering v Pickering*, 268 Mich App 1, 13; 706 NW2d 835 (2005). Here, the record reveals that although the four-wheeler was a gift to defendant from his brother, the four-wheeler was used by both parties, as evidenced by the facts that plaintiff had possession of the four-wheeler at her mother’s house and that it did not remain with defendant at the marital home. The trial court did not clearly err by characterizing the four-wheeler as marital property and did not abuse its discretion in awarding it to plaintiff.

Defendant next makes several allegations of error concerning the trial court’s award of spousal support to plaintiff. In reviewing a trial court’s award of spousal support in a divorce case, we review for clear error the trial court’s findings of fact. *Gates, supra* at 432. The findings are presumptively correct, and the appellant bears the burden of showing clear error. *Id.* If the trial court’s findings of fact are not clearly erroneous, we must decide whether the dispositional ruling was equitable in light of the facts. *Id.* at 433. “The trial court’s decision regarding spousal support must be affirmed unless we are firmly convinced that it was inequitable.” *Id.*

Factors to be considered by the trial court in determining whether an award of spousal support is just and reasonable are set out in *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991), and include:

(1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay [spousal support], (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, . . . (12) general principles of equity[, and (13)] . . . fault

Defendant argues that the trial court failed to consider that plaintiff voluntarily reduced her income by not charging her friends “the actual amount of what her work is worth” and by refusing to advertise her fledgling interior design/wall treatment business and instead relying on word of mouth. Defendant is correct that a voluntary reduction of income may be considered in determining the proper amount of spousal support. *Moore v Moore*, 242 Mich App 652, 655; 619 NW2d 723 (2000). If a court finds that a party has voluntarily reduced her income, it may impute additional income in order to arrive at an appropriate award of spousal support. *Id.* Here, however, plaintiff did not voluntarily reduce her income. The trial court specifically noted that she earned a “very modest [gross] income” of \$7,983 in 2005. Defendant essentially argues that the trial court erred in failing to award plaintiff spousal support in line with plaintiff’s prospectively attainable income. However, the record reveals that this is exactly what the trial court did. The trial court recognized that plaintiff was “hopeful of expanding her business and her income in the future.” The judgment of divorce provided that plaintiff was to receive twelve years of spousal support divided into three periods of four years each: \$1,000 a month for the first four years; \$750 a month for the next four years; and \$500 a month for the final four years. The trial court’s twelve-year, incremental step-down plan in spousal support was specifically designed to “hopefully be offset by increases in her earnings.” The trial court did not clearly err in its findings concerning plaintiff’s ability to work.

Defendant also argues that the trial court placed too much emphasis on plaintiff’s age in determining the award of spousal support; he contends that, because she was in good health, the trial court should have placed more weight on her ability to earn income. The record reveals that the trial court recognized that plaintiff was 50 years of age, in good health, and “was only sporadically employed part time.” However, as noted above, the trial court also recognized that plaintiff’s business had the potential for expansion and specifically awarded spousal support in an incremental step-down format, in anticipation of her increasing income, as well as her forthcoming ability to draw on her social security and other retirement benefits. This case is similar to *Wiley v Wiley*, 214 Mich App 614, 615; 543 NW2d 64 (1995), where the wife had a history of part-time employment and this Court recognized that “although the trial court certainly intended to encourage her to work full-time[,] that objective is not always attainable for people in their fifties, male or female.” Similarly, in *McLain v McLain*, 108 Mich App 166, 173; 310 NW2d 316 (1981), this Court found that the fact that the plaintiff was 55 years of age would “probably be detrimental to her ability to find work, even if she is able.” The trial court here properly took into account plaintiff’s age, health, and ability to work in determining whether and how much of an award of spousal support was warranted.

Defendant next argues that the trial court erred in not finding that the pensions (divided by the qualified domestic relations orders [QDROs]) could be used in determining spousal support. The trial court awarded plaintiff one-half of defendant's 457 plan and one-half of the marital share of defendant's municipal employee plan through two QDROs. The trial court commented that "[t]he terms for the QDRO as set forth in the proposed judgment are deemed fair and proper, including sole surviving spouse status for those plan benefits already accrued as of the date of Judgment."

"Pensions are considered part of the marital estate subject to award upon divorce." *Magee v Magee*, 218 Mich App 158, 164; 553 NW2d 363 (1996). "Pensions may be distributed through either the division of property or the award of [spousal support], depending on the equities and circumstances of the specific case." *Id.* at 164-165. "While the division of a marital asset such as a pension through an award of [spousal support] is not always favored, see *Keen v Keen*, 160 Mich App 314, 316-317; 407 NW2d 643 (1987), it is an acceptable method of distributing a pension in some cases." *Stoltman v Stoltman*, 170 Mich App 653, 658-659; 429 NW2d 220 (1988). Here, the trial court characterized defendant's retirement accounts as marital property and divided them as such. This was in line with the more favorable method of distribution of retirement assets. "[C]haracterizing any payment as a property distribution rather than [spousal support] . . . entitle[s] the nonpension-holding spouse to receive the assets due him or her regardless of remarriage or death." *Keen, supra* at 317. This method achieves an "equitable distribution of the marital estate . . . regardless of such events as death and remarriage." *Id.* The trial court did not err in distributing the retirement assets through the property division.

Defendant next argues that the trial court erred in failing to find that his current expenses included paying for his adult daughter's college loans. The record reveals that the trial court recognized that more than \$400 of defendant's monthly expenses was for the parties' adult children, but it noted that defendant *voluntarily* assumed those expenses.

Defendant testified that he was paying \$300 a month on his adult daughter's three college loans, two of which he had co-signed.² Defendant argues on appeal that, because he cosigned the loans and because his daughter is not making payments on them, he has a legal obligation to do so. However, defendant did not advance this argument at trial or offer any proof that his daughter was delinquent; therefore, the trial court did not clearly err in determining that defendant's payments were voluntary and in accordingly declining to consider those expenses when calculating spousal support. See, generally, *Lesko v Lesko*, 184 Mich App 395, 405; 457 NW2d 695 (1990), rejected in part on other grounds by *Booth v Booth*, 194 Mich App 284, 290-291 (1992).

Finally, defendant argues that the trial court erred in failing to consider that plaintiff was living with her mother, thereby reducing her expenses. The record reveals that the trial court was

² Plaintiff disputed that defendant had co-signed the loans.

aware of the situation; it stated that, while plaintiff lived with her mother at the time of the hearing to reduce expenses, she wished to “become independent and get out on her own.”

Defendant is correct that “the effect of cohabitation on a party’s financial status” is a factor to be considered in determining spousal support. *Olson, supra* at 631. However, as recognized by the trial court, while plaintiff did testify that she was living with her mother and that she was not being forced to move from that residence, she also testified that she desired to have her own place and did not want to continue living with relatives. “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.” *Id.* On the facts of this case, it would be inequitable to force plaintiff to live with her mother, while allowing defendant to remain in the marital home. The trial court did not err in fashioning an award of spousal support that would enable plaintiff to fulfill her wish of living independently.

The record reveals that the trial court considered relevant factors when making its determination regarding the amount and duration of spousal support. The trial court’s findings are supported by the record and are not clearly erroneous, and the trial court’s award of spousal support was fair and equitable in light of the facts. *Id.* at 629-630. Accordingly, we must affirm the trial court’s decision regarding spousal support. *Id.* at 630.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter