

STATE OF MICHIGAN
COURT OF APPEALS

KIMBERLY GENTRY,

Plaintiff-Appellee,

v

DANNIE J. GENTRY, M.D.,

Defendant-Appellant.

UNPUBLISHED

October 22, 2013

No. 307071

Mason Circuit Court

LC No. 09-000341-DM

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Defendant Dannie J. Gentry, M.D., appeals as of right the judgment of divorce dividing the parties' marital assets and ordering defendant to pay plaintiff Kimberly Gentry's attorney and expert witness fees. We affirm the trial court's property division, but remand for an evidentiary hearing with regard to the reasonableness and amount of plaintiff's attorney and expert witness fees according to *Smith v Khouri*, 481 Mich 519, 528-531; 751 NW2d 472 (2008).

I. BASIC FACTS AND PROCEDURAL BACKGROUND

Plaintiff and defendant were married in December 1991, after defendant completed his first semester of medical school. Plaintiff had a high school education when the parties married and did not complete any college during their marriage. Plaintiff worked as a bank teller to support the couple while defendant completed his medical degree. Plaintiff left her employment with the bank shortly after their first child was born, and thereafter worked in the home, providing childcare and other household responsibilities. Defendant began his medical practice in 1999, and, in 2005, the parties constructed defendant's 5,500 square foot medical building. With regard to the dissolution of the marriage, both parties agreed that they were "never able to communicate very effectively with each other." There was domestic violence which left plaintiff with bruises and other injuries.

Tax returns submitted at the divorce trial indicated that defendant's adjusted gross income was close to \$300,000; however, despite defendant's substantial income, the party's debts exceeded their assets and neither party had any savings or retirement accounts. The trial court issued an opinion on June 22, 2011, which divided the marital assets and served as the basis for the judgment of divorce, entered October 21, 2011. Plaintiff received several items of personal property, including a vehicle, two snowmobiles, and a batting cage. Defendant received the medical practice, medical building, marital residence, and a 1989 Tiara 3600 boat, in addition

to other items of personal property, along with the debt on these properties. Because both parties testified that they did not want the marital residence, the trial court ordered defendant to list it for sale. The judgment of divorce indicated that plaintiff could live in the residence until the sale; however, she would be responsible for all expenses including mortgage, taxes, utilities, and insurance, if she chose to stay in the residence. Additionally, the trial court ordered defendant to repair the home's heating system for plaintiff's benefit if she decided to stay until the sale. The trial court also ordered defendant to pay plaintiff \$125,000 over the course of six years, as part of the property settlement. Including the \$125,000 property settlement, the judgment of divorce allocated assets worth \$129,562 to plaintiff and assets with a negative net worth of \$320,139 to defendant. Finally, the trial court ordered defendant to contribute \$13,000 towards plaintiff's expert witness fees and \$23,000 toward plaintiff's attorney fees.

II. ANALYSIS

Defendant alleges several points of error with regard to the trial court's property division. First, defendant asserts that the trial court erroneously required defendant to pay plaintiff \$125,000 in additional alimony, in violation of the parties' non-modifiable spousal support arrangement. Next, he argues that the trial court erroneously allocated the student loan debt to defendant. Further, defendant argues that the trial court erroneously assigned him the medical building without consideration of the building's debt. Finally, defendant contends that the trial court acted inequitably by awarding the marital home to defendant and ordering it sold. Defendant has no objections to the sale of the residence; however, he argues that it is inequitable to force defendant to bear the cost of the sale and simultaneously allow plaintiff to live in the residence until the sale.

When reviewing the division of the marital estate on appeal, "this Court must first review the trial court's findings of fact for clear error." *Berger v Berger*, 277 Mich App 700, 717; 747 NW2d 336 (2008), citing *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). "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 was made." *Id.*, citing *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002). "If the trial court's findings of fact are upheld, this Court must decide whether the trial court's dispositional ruling was fair and equitable in light of those facts. This Court will affirm the lower court's discretionary ruling unless it is left with the firm conviction that the division was inequitable." *Berger*, 277 Mich App at 717-718.

"The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances." *Id.* at 716-717; *McNamara*, 249 Mich App at 188. Accordingly,

[t]he trial court need not divide the marital estate into mathematically equal portions, but any significant departure from congruence must be clearly explained. Trial courts may consider the following factors in dividing the marital estate: (1) the duration of the marriage, (2) the contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life situation of the parties, (6) the necessities and circumstances of the parties, (7) the parties' earning abilities, (8) the parties' past relations and conduct, and (9) general principles of equity. When dividing marital property, a trial court may

also consider additional factors that are relevant to a particular case. [*Berger*, 277 Mich App at 717 (citations omitted).]

We find no clear error with regard to the trial court's factual findings. With regard to the \$125,000 payment, defendant incorrectly asserts that this was additional alimony; however, it is clear from the trial court's opinion and judgment of divorce that the \$125,000 was part of the property settlement or "alimony in gross," *Staple v Staple*, 241 Mich App 562, 578, 578 n 14; 616 NW2d 219 (2000), not additional spousal support. Additionally, we reject defendant's argument that the trial court did not consider the debt on the medical building. Specifically, the trial court stated, "Given the fact that Dr. Gentry wants this property and Mrs. Gentry doesn't, it is awarded to Dr. Gentry together with the underlying mortgage." Thus, we find no merit in defendant's argument that the trial court erroneously failed to consider the building's debt.

Because the trial court did not clearly err in its findings of fact, the issue then becomes whether the trial court's dispositive ruling was fair and equitable in light the facts. *Berger*, 277 Mich App at 716-717. The trial court's opinion recognized several of the applicable property division factors, including: the parties' 20-year marriage, the vast difference in the parties' present earnings and future earning potential, that plaintiff was out of the work force for the majority of the parties' marriage in order to raise their three children, the parties equal contributions to the marriage, and that the parties' marriage deteriorated because of poor communication skills and because of defendant's physical abuse. Relevant to the facts of this particular case, *Sparks*, 440 Mich at 160, the trial court also considered that plaintiff did not make a specific claim to defendant's medical degree, even though the evidence of record supported the fact that she aided defendant in obtaining the degree. Moreover, the trial court considered that defendant used the medical building as a deduction on his taxes, the building was profitable, and defendant had no plans to sell the medical building.

According to the trial court's property division, plaintiff received \$129,562 while defendant received a negative amount of \$320,139 when the \$125,000 property payment, defendant's student loan debt, and debts on the assets awarded to defendant are considered. However, with the aid of defendant's medical degree, which plaintiff helped defendant earn, this sum is equivalent to only about 1-1/2 years of defendant's salary. Further, defendant received the only income producing assets the parties had, specifically his medical degree and the building. This Court has previously held that a trial court may award more than half of the marital estate to a party because of a lesser earning capacity coupled with considerations of the other property division factors. See *Welling v Welling*, 233 Mich App 708; 592 NW2d 822 (1999). Accordingly, although the trial court did not distribute the marital assets equally, we find that the trial court adequately explained its reasons for departure, and the property division was equitable in light of the circumstances of this case. *Berger*, 277 Mich App at 716-717.

Additionally, with regard to the conditions the trial court placed on the marital residence, we note that plaintiff must continue to pay the mortgage and all other expenses on the home for as long as she resides there, and defendant will keep any proceeds from its sale. Moreover, although the trial court ordered defendant to list the residence for sale, there is no deadline concerning when the residence must be sold. Accordingly, defendant's assertion that the trial court forced him to sell the property at a loss is entirely without merit. This Court has imposed similar requirements in a divorce action with facts similar to this case, see *Vaclav v Vaclav*, 96

Mich App 584, 592; 293 NW2d 613 (1980), and we do not find that it was inequitable here. Therefore, we affirm the trial court's dispositional ruling.

Next, defendant argues that the trial court abused its discretion in ordering defendant to pay a portion of plaintiff's attorney and expert witness fees. This Court reviews a trial court's ruling on a request for attorney fees and expert witness fees for an abuse of discretion. *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008). However, this Court reviews any findings of fact on which the trial court bases an award of litigation fees for clear error. *Reed*, 265 Mich App at 164. "In domestic relations cases, attorney fees are authorized by both statute, MCL 552.13(1), and court rule, MCR 3.206(C)." *Reed*, 265 Mich App at 164. "A party seeking attorney fees must establish both financial need and the ability of the other party to pay." *Ewald v Ewald*, 292 Mich App 706, 724; 810 NW2d 396 (2011). Further, "a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Id.* Moreover, fees must be reasonable, and the burden of proving the reasonableness of the requested fees rests with the party requesting them. *Smith*, 481 Mich at 528-529.

It was undisputed at trial that plaintiff has only a high school education and no income apart from defendant's child support and alimony payments. While defendant argues that plaintiff was irresponsible with the money he gave her after their separation, and could have paid her litigation expenses using these funds, plaintiff testified that she spent this money on their children and residence, and this Court gives special deference to a trial court's factual findings based on witness credibility. *Sparks*, 440 Mich at 147; MCR 2.613(C). Defendant testified that his annual income was about \$300,000, and that he spends a large portion on his boating and fishing. Thus, the trial court's finding that plaintiff did not have the ability to pay the fees and that defendant had the ability to pay was not clearly erroneous. *Reed*, 265 Mich App at 164. However, the trial court's findings with regard to the reasonableness and amount of the fees are inadequate for appellate review. Evidence with regard to plaintiff's litigation fees admitted at trial was contradictory and did not include the number of hours worked or the hourly rate plaintiff's attorney charged. Further, the record is devoid of consideration of any of the factors used to determine whether an attorney fee is reasonable. See *Smith*, 481 Mich at 528-531. The same factors should be used to determine whether the expert witness fees are reasonable. *Olson v Olson*, 256 Mich App 619, 636-637; 671 NW2d 64 (2003). "When requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services." *Reed*, 265 Mich App at 166. Thus, we remand this issue to the trial court for a hearing to determine the reasonableness and amount of the attorney and expert witness fees according to the factors outlined in *Smith*, 481 Mich at 528-531.

Finally, both parties argue that this Court should remand this case for a determination of their appellate fees and costs, or order a specific amount of appellate attorney fees. We deny defendant's request because he has not asserted any facts to show that he is unable to pay or that plaintiff is able to pay. See *Ewald*, 292 Mich App at 724. With regard to plaintiff's request, because there is no clear error with the trial court's finding that plaintiff was unable to bear the expense of the divorce proceedings and that defendant had the ability to pay, and there is no evidence of record demonstrating that the position of the parties has changed, on remand, the trial court should determine an appropriate award of plaintiff's attorney fees for this appeal. "[W]e believe the trial court is in a better position to determine the reasonableness and necessity

of such an award, and we remand to the trial court for that purpose.” *Wiley v Wiley*, 214 Mich App 614, 616; 543 NW2d 64 (1995).

We affirm the trial court’s property division, but we remand for an evidentiary hearing with regard to the reasonableness and sum of plaintiff’s trial and appellate attorney and expert witness fees. We do not retain jurisdiction.

/s/ Michael J. Riordan

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly