

STATE OF MICHIGAN
COURT OF APPEALS

DANETTE BAYNE,

Plaintiff-Appellee,

v

RANDY BAYNE,

Defendant-Appellant.

UNPUBLISHED
December 19, 2013

No. 311968
Ottawa Circuit Court
LC No. 11-069153-DO

Before: WHITBECK, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Defendant, Randy Bayne, appeals as of right the judgment of divorce dividing the parties' marital assets and ordering defendant to pay spousal support to plaintiff, Danette Bayne. For the reasons set forth in this opinion, we affirm.

Plaintiff and defendant were married in February 1999. There were no children of the marriage. Plaintiff has a bachelor's degree in business administration and worked as a pharmaceutical representative. She had accumulated about \$335,000 in retirement account savings, including a T. Rowe Price investment account and about \$97,000 in a "cash balance" account before the marriage. Plaintiff also owned a residence, which had some equity. Defendant has a bachelor's degree and owned his own residence, which he sold in September 1998. He earned about \$45,000 in net profit from the sale. Defendant also had a retirement account with about \$46,000 in savings. Defendant owed about \$13,000 or \$14,000 on a boat that he purchased in 1993, about \$5,000 in credit card debt, and had a personal loan of about \$45,000.

The parties earned substantial income, with plaintiff making about \$360,000 more than defendant during the marriage. Their expenditures, however, exceeded their earnings. They lived in plaintiff's residence and refinanced it at least three times during the course of the marriage, using a portion of the money to eliminate defendant's personal and boat loans. At the time of the divorce trial, the parties had two mortgage payments on the residence, totaling about \$1,800 per month. Additionally, during the marriage plaintiff suffered from a brain tumor and defendant had sinus surgeries, which resulted in \$2,077 in unpaid medical debt. To pay for medical bills, household expenses, credit card bills, finance family vacations, and to compensate for defendant's income during periods where he was unemployed, plaintiff withdrew a large portion of her retirement accounts over the course of the marriage and completely dissolved the "cash balance" account. Defendant also withdrew his \$46,000 retirement account to pay for

family expenses during the marriage between the years of 2005 and 2007. Finally, the parties incurred significant tax debt because they failed to pay taxes on a portion of the money withdrawn from plaintiff's retirement account. Thus, at the time of the divorce trial, the parties owed about \$31,000 in back taxes and penalties.

With regard to the parties' income, plaintiff continued to work as a pharmaceutical representative until June 2008, where she earned about \$120,000 to \$140,000 annually. However, in June 2008, she took several months of medical leave after doctors discovered her brain tumor and eventually "lost [her] job" when her position was eliminated. Plaintiff was unable to find another pharmaceutical position and began work with another employer earning about \$70,000 a year. In 2010, defendant was hired as a sales manager in Grand Rapids and continued that employment at the time of the divorce trial. He earned about \$130,000 per year in this position and received other benefits.

At the trial, plaintiff testified extensively concerning defendant's physical abuse, which resulted in medical treatment, and defendant's extramarital affairs. Defendant admitted to some physical abuse, but denied that plaintiff ever received medical treatment and denied that he engaged in sexual relationships with any other woman during the marriage.

The trial court issued an opinion on April 24, 2012, which divided the marital assets and served as the basis for the judgment of divorce, entered July 30, 2012. The trial court found that the residence was marital property because the parties refinanced the residence several times and comingled the resulting funds with marital funds. The boat was marital property because the parties paid the debt on the boat by refinancing the marital residence. Plaintiff's remaining retirement account had a premarital balance of \$207,784, and this amount was premarital property. Because the account had a value of \$274,762 at the time of the divorce trial, \$66,978 of the account was marital property. Based upon these findings and the property division factors found in case law, the trial court held that,

[i]n this case, as discussed in detail above, [plaintiff] brought in a significantly greater amount of pre-marital property, some of which was used to pay [defendant's] debt, and to fund their living expenses over 13 years of marriage. [Plaintiff] also earned a greater share of the parties' total income. She now has the greater need, given the decline in her income and her higher debts, and equity in this case requires an uneven distribution to rectify these imbalances and to compensate her for years of severe physical abuse. The court concludes that an equitable distribution of the parties' assets requires 65% to [plaintiff], and 35% to [defendant].

Thus, out of a marital estate worth about \$39,305, plaintiff was awarded \$25,548 and defendant was awarded \$13,757. The trial court assigned specific debts to each party and ordered that they each pay half of the income tax liability. Defendant was also ordered to pay plaintiff \$1,000 a month in spousal support for five years. The trial court denied plaintiff's request for attorney fees. Defendant now appeals, challenging the trial court's judgment with respect to the property division and spousal support.

We review for clear error a trial court's findings of fact in regard to the division of a marital estate. *Berger v Berger*, 277 Mich App 700, 717; 747 NW2d 336 (2008). "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.* We must then 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." *Id.* at 717-718. "The same review standard applicable to the division of marital property applies to awards of spousal support." *Id.* at 727. Thus, like property division, "[t]he trial court's findings of fact relating to an award of spousal support are reviewed for clear error." *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010).

On appeal, defendant does not dispute the trial court's findings of facts. Moreover, defendant does not challenge the property division award or the spousal support award individually; rather, defendant's argument is that the property award and the spousal support award, taken together, constitute an impermissible "double dip." Defendant also argues that when the division of property is considered in light of the spousal support award and the allocation of the parties' debt, the cumulative award is inequitable.

Turning first to defendant's argument that the trial court's awards constitute an impermissible double dip, defendant specifically argues that a double dip occurred because the trial court relied on the same rationale for its spousal support award and its division of the marital property. This argument misconstrues the meaning of the term "double dip" in divorce proceedings. In a "double dip" situation, the trial court awards a certain percentage of the asset as part of the property division and then awards another portion of the same asset as spousal support. See *Loutts v Loutts*, 298 Mich App 21, 26-27; 826 NW2d 152 (2012) ("'Double dipping'—or 'tapping the same dollars twice'—refers to situations where a business or professional practice is valued by capitalizing its income, some or all of which is also treated as income for spousal support purposes."); *Washington v Washington*, 283 Mich App 667, 669; 770 NW2d 908 (2009). The term "double dip" does not refer to a situation like this case where the trial court awards spousal support and property division based on the same *factors*, not from the same *asset*. Moreover, it was not improper for the trial court to consider the same factors for both its property allocation and its spousal support determination because the same factors are relevant to both types of awards. See, e.g., *Moser v Moser*, 184 Mich App 111, 117; 457 NW2d 70 (1990) (stating that the factors considered for determination of an alimony award are the same as the factors considered for division of marital property); *Berger*, 277 Mich App at 717, 726-727 (setting forth factors to be considered when dividing marital estate and when determining whether to order spousal support).

Next, defendant argues that the trial court's division of property, award of spousal support, and allocation of the parties' debt was inequitable when the cumulative effect of all three determinations is considered. Specifically, defendant notes that at the time of the divorce, plaintiff had considerable pre-marital retirement savings, whereas he had no retirement savings or assets of any kind. Defendant also notes that plaintiff owned a 2009 Mazda CX7 automobile that was a gift to her and was not part of the marital estate. Defendant does not dispute that the aforementioned assets are plaintiff's separate property; however, he argues that plaintiff's possession and ownership of the assets increases the financial disparity between the parties and

renders the total division of property, spousal support award, and debt allocation inequitable. We disagree.

A trial court must distinguish between marital property and separate property when distributing property in a divorce. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Generally, the separate property of each party is not considered when distributing property during divorce proceedings. *Id.* at 494. This Court has made clear that “it does not matter if the division of the entire holdings appears one-sided, what is important is the division of the marital estate.” *Id.* at 497. Thus, the trial court correctly ignored plaintiff’s separate assets when dividing the parties’ assets and allocating their debts. When the parties’ marital property alone is considered, the trial court’s division of property, even considered in light of its debt allocation and spousal support award, was not inequitable. The parties accumulated few assets during the course of the marriage, and plaintiff’s property award was only about \$11,791 more than defendant’s property award and neither award was substantial. Further, plaintiff’s separate premarital assets are not assets that plaintiff can use to pay her living expenses, and only \$55 of plaintiff’s property award was cash; thus, the remainder of the assets was not readily available to help plaintiff with household expenses or bills. Accordingly, the fact that plaintiff possessed separate, premarital assets and received a larger property award does not reduce her need for support. Finally, with regard to defendant’s argument about the mortgage payments and insurance payments made during the separation, the trial court held that he could use those payments as deductions on his taxes; thus, contrary to defendant’s argument, he was compensated in part for these payments. Thus, we cannot find that the trial court’s order and judgment of divorce was clearly erroneous.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher