

STATE OF MICHIGAN  
COURT OF APPEALS

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LANA D. EBERSOLE,  
Plaintiff-Appellee,

UNPUBLISHED  
February 6, 2001

v

LARRY M. EBERSOLE,  
Defendant-Appellant.

No. 228374  
Jackson Circuit Court  
LC No. 98-089520-DM

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Before: Wilder, P.J., and Hood and Cavanagh, JJ.

PER CURIAM.

After prolonged and acrimonious divorce proceedings, the trial court granted a judgment of divorce. Each party was granted significant property. Plaintiff was awarded physical custody of the parties' minor daughters, who lived with plaintiff during the pendency of the divorce. Defendant was awarded physical custody of the parties' minor son, who lived with him during the pendency of the divorce. The parties maintained joint legal custody of the children, all of whom are now teenagers. A visitation schedule, wherein all three siblings would be together with one parent, was put into place. Defendant appeals as of right, arguing issues related to the property settlement, the custody arrangement and the visitation schedule. We affirm.

Defendant first argues that the property settlement was inequitable and that he was given a disproportionately smaller share of the marital estate than plaintiff. In reviewing a divorce judgment, we review the trial court's findings of fact for clear error and then determine whether the ultimate dispositional ruling was fair and equitable in light of the facts. *Byington v Byington*, 224 Mich App 103, 109; 568 NW2d 141 (1997), citing *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). We will reverse the disposition only if we are left with the firm conviction that the distribution was inequitable. *Byington, supra* at 109.

The goal of the court when apportioning a marital estate is to reach an equitable division in light of all the circumstances. Each spouse need not receive a mathematically equal share, but significant departures from congruence must be explained clearly by the court. When dividing the estate, the court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health, and needs, fault or past misconduct, and any other equitable circumstance.

[*Id.* at 114-115, citing *Sparks v Sparks*, 440 Mich 141, 158-160; 485 NW2d 893 (1992) (citations omitted).]

Having reviewed the trial transcripts as well as the parties' exhibits, which purport to set out the property division as ordered by the trial court, we find that there was an equitable division in light of all of the circumstances. While the division of the property was not mathematically equal, it was not as disparate as defendant claims. The trial court's opinion dividing the property was detailed, summarized all of the testimony, and noted the relevant considerations. The trial court specifically indicated that because the marriage was already headed for a divorce at the time of defendant's infidelity, fault would not be weighed as heavily as it would have been under different circumstances. The trial court clearly articulated, however, that plaintiff would receive more assets than defendant. The trial court appeared to be troubled by defendant's lack of candor with regard to his income and his lack of credibility on other issues.

Plaintiff was awarded the two homes on Stoney Lake Road, the cabin, one of the parties' rental properties, her automobile, the horses and their related items, one-half of the retirement account, and the personal property in her possession. Defendant was awarded his automobile, snowmobiles, the automobile he purchased for his son, a trailer, his business, vacant real estate lots, three rental properties on West Brooklyn Road, a pop-up camper, a snowplow, and the personal property in his possession. The record also reflects that defendant had approximately \$10,000 worth of tools in his possession as part of that personal property. We are unable to conclude that any of the trial court's factual findings with regard to the property distribution were clearly erroneous. We are not left with a definite and firm conviction that the property distribution was inequitable.

Defendant next argues that the trial court failed to take into account considerable marital debt when it apportioned the marital estate. We disagree. Most of the debt to which defendant refers in his brief on appeal was debt of Ebersole Electric. The debt was considered by the trial court when valuing Ebersole Electric. In addition, when awarding Ebersole Electric to defendant, the trial court relieved plaintiff of responsibility for any debts associated therewith. Thus, the debts of Ebersole Electric were considered and disposed of in the judgment of divorce.

The other debt about which defendant complains was a \$19,000 debt owed to his father. The trial court was aware of this debt at the time it rendered its decision, but the decision did not specifically address the debt. It indirectly addressed only a portion of the debt. There was testimony at trial that defendant used \$10,000 of the \$19,000 to purchase a new truck. The truck was awarded to defendant in the settlement, and any debt associated with the truck was assigned to defendant. In addition, the evidence revealed that \$2,000 of the money was used to meet Ebersole Electric's payroll. This was a debt of Ebersole Electric and was dealt with in the judgment of divorce. It is unclear from the record where the remainder of the money that defendant borrowed from his father was spent. It is equally unclear whether the debt is a marital debt and whether it was disposed by the judgment. Defendant never raised this issue before entry of judgment or in his motion for new trial; if he had, the trial court could have reviewed and ruled on the issue. Thus, we decline to make any ruling with regard to this unpreserved issue.

Defendant next argues that the conduct of plaintiff and her counsel at trial tainted the case and raised unsubstantiated innuendo, which fostered the bias of the trial court against defendant.

We disagree. Plaintiff properly explored the issue of fault at trial. She also properly explored the issue of defendant's income and the value of his business, including whether he failed to disclose earnings and whether he engaged in unreported bartering and cash transactions. Plaintiff had first-hand knowledge of how defendant's business was run and, she was entitled to testify about what she knew. The issues she raised were relevant to determinations that the trial court needed to make. The record does not support that defendant was tainted by unsupported innuendo. Further, we do not believe that plaintiff's counsel deliberately and improperly misled the trial court into finding that defendant was not a credible witness. Defendant's own conduct throughout the course of the proceedings was far more harmful than any alleged innuendo. His untruthfulness was exposed through the testimony of two witnesses who contradicted his trial testimony. In addition, his conduct was not above reproach. He injected the unsupported allegation that plaintiff engaged in lesbian conduct into trial. The trial court took specific note of this tactic when rendering its decision. We do not find that the conduct of plaintiff or her trial counsel was inappropriate or supports defendant's argument that a new trial before a new judge is warranted.

In making our ruling, we note that defendant also argues that the trial court should have disqualified itself. This issue is not raised in defendant's questions presented on appeal and thus, review is inappropriate. *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998). Moreover, defendant never asked the trial court to disqualify itself before trial. Therefore, the issue is not preserved. We reject defendant's repeated suggestion that the trial court must have been unfair because this Court found that it had acted improperly in the unrelated divorce case of Jeani and Douglas Stepke. The circumstances under which this Court reversed and remanded the Stepke's case were entirely different. The case was remanded because of distinct errors of law and, only on remand, was a new judge assigned for reasons that are inapplicable to the case at hand. Defendant's infidelity in this case was not the focus of the trial court's decision and did not improperly permeate the trial court's rulings.

Defendant also argues that the trial court improperly granted him an asset that was no longer owned, specifically his 1999 truck. There was no testimony or evidence at trial to support that the truck had been sold and was no longer an asset capable of being apportioned in the property settlement.

Additionally, defendant argues that the trial court improperly valued his business. We disagree. The trial court was presented with minimal information. Plaintiff claimed that the business was worth \$100,000 based on defendant's assertion in a loan application that the business was worth that much. She also relied on the amount of money that went into Ebersole Electric's business accounts in 1998. Defendant offered evidence that the business had approximately \$45,000 in debt at the time of trial and had minimal tangible assets. Defendant testified that the business was not worth even the amount of the debt owed. Given all of the information, the trial court valued the business at \$30,000. We do not find that this was clearly erroneous. The business provided an income, had some assets, including defendant's experience and ability, and had significant gross receipts. We note that while defendant claims that the valuation was incorrect, he provides no specific information to support his argument and, he offers no alternative value for the business. After reviewing the testimony and evidence, we find that the trial court did not err in rejecting defendant's claim that the business had no value. The

value assigned to the business by the trial court was approximately one-half of the gross receipts for 1998 minus the debt defendant claimed was owed by the business.

In concluding that the trial court's valuation was not erroneous, we note that defendant argues that plaintiff had an obligation to value the business in a certain manner if she wanted the asset included in the marital estate. This argument is not well-founded. In general, the trial court must determine whether a particular asset is a marital asset and must value the asset. *Byington, supra*, 224 Mich App 114, n 4. In this case, it is undisputed that Ebersole Electric was a marital asset. The trial court needed to value and divide the asset. While defendant complains that the trial court did not have sufficient information to value the asset, we find that this does not warrant relief. In *Perrin v Perrin*, 169 Mich App 18, 21; 425 NW2d 494 (1988), the plaintiff testified about what he thought the value of the family business was. He offered no evidentiary support for the amount that he stated. The defendant in *Perrin*, like defendant herein, offered no evidence at all to assist the trial court in establishing the value of the business. The trial court did not value the business per se but awarded it to defendant. *Id.* On appeal, the defendant argued that the trial court had committed error. *Id.*, p 23. This Court disagreed, noting that the trial court reviewed the only information that it had and that it was not required to do the parties' jobs. *Id.* The parties had ample time to conduct discovery and present proofs. *Id.* This Court reminded the parties that the trial court is a fact finder and not a fact provider. *Id.* The trial court in this case was not the fact provider. It could rely only on the information given. It considered plaintiff's argument that the business was worth \$100,000, the fact that the business claimed gross receipts of \$104,000 in 1998, and that the business allegedly had approximately \$45,000 in debt.

Defendant next argues that the trial court erred in imputing income to him when determining awards of alimony and child support. Again, we disagree. We review the trial court's findings of fact (here, the amount of defendant's income) for clear error. *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999).

A support order can be based on the unexercised ability to earn. *Olson v Olson*, 189 Mich App 620, 621-622; 473 NW2d 772 (1991).

[W]hen a party voluntarily reduces or eliminates income, and the trial court concludes that the party has the ability to earn an income and pay child support, the court does not err in entering a support order based upon the unexercised ability to earn. [*Id.* at 622 (citation omitted).]

In this case, defendant claimed that his yearly income was only \$20,600 from his self-employment as a master electrician. He wanted any support orders to be calculated using that sum. The trial court refused to attribute the small income to defendant. This was not erroneous. There was evidence that defendant was previously employed as a master electrician at the University of Michigan for \$43,600 per year. He voluntarily, with the support of plaintiff, left that position to make his part-time business into a full-time venture. After that time, the family continued to enjoy a substantial lifestyle. While defendant claimed that he only made \$20,600 from his full-time business, there was evidence that defendant made more by taking cash or bartering for goods and not declaring them as income. Defendant denied this but the trial court did not find him to be credible. Plaintiff testified that defendant took cash and goods without

declaring them. She was familiar with his business practices and was entitled to testify about what she knew. In addition, there was testimony from a witness that defendant, who denied taking cash payments, offered the witness a discount for paying in cash. In addition, defendant admitted at trial that he could make \$40,000 as a master electrician. Given that there was substantial testimony that defendant did not report all of the income generated by his business, the trial court did not err in finding that his income was substantially higher than he claimed. Thus, the trial court did not wrongly impute income to defendant.

The trial court's grant of alimony was also proper. The trial court considered the relevant factors in determining alimony. It considered that the parties were married almost twenty years and that there was a disparity in income. In addition, the trial court took into consideration that for the short term, plaintiff needed to work part-time while finishing her education after which she would better be able to support herself. Plaintiff had afforded defendant the opportunity to finish his education when the parties first married. The Court also accounted for the age of the parties and their past lifestyle. The objective of alimony—to balance the incomes and needs of the parties—was met by the award of alimony in the case.

Next, defendant argues that the trial court never addressed his petition “for relief from order.” The record does not support this claim. Defendant filed a petition for the sale of real estate after trial but before the trial court rendered its decision. Defendant alleged that he could not meet his expenses and that he wished for some of the real property to be sold to pay the debts. Defendant also, in a separate motion, moved for a mistrial and asked the judge to disqualify himself. On the date set for the hearing, the trial court addressed defendant's motion for mistrial and disqualification in detail. It then indicated that the petition for sale of real estate was not necessary in light of the trial court's opinion and order in the underlying divorce case, which decision was presented to the parties at that time. On appeal, defendant argues that the trial court's written opinion and order did not dispose of the issues related to his petition for the sale of real estate and that the trial court was obligated to decide that petition. This argument has no merit. The trial court's opinion and order disposed of all of the property in the marital estate, awarding it to one party or the other. Defendant was awarded property that he could sell or borrow against to pay his obligations. The issues raised in the petition to sell the real estate were thus covered by the opinion and order. In affirming the trial court, we note that defendant's petition did not raise any issues related to the temporary order. Specifically, defendant never requested relief from the trial court's temporary order, which required defendant to pay for certain things. Defendant never requested that the trial court relieve him from his obligations under the interim order or from the incurred debts and arrearages.

Defendant also argues that plaintiff committed procedural errors in failing to timely submit the judgment to the trial court for entry. Defendant argues that the procedural errors benefited plaintiff and made him liable for additional debts. He argues that this was fundamentally unfair and asks this Court to relieve him of all responsibilities under the interim order as of January 21, 2000, the date he filed his petition for the sale of real estate. This issue was not raised and decided by the trial court and is not preserved for appellate review. Defendant first mentioned the delay in the entry of judgment in a post-judgment motion, but he did not ask for relief or present any issue with regard to the delay that needed to be ruled upon by the trial court. We decline to address this unpreserved issue because there is insufficient information in

the record to determine whether the delay in the entry of judgment was attributable only to plaintiff and her counsel such that defendant is entitled to relief.

Finally, defendant argues that the trial court improperly failed to grant joint physical custody of all three children to him and plaintiff and that the visitation order was an abuse of discretion. We disagree.

Defendant does not contest the trial court's findings with regard to established custodial environment. Defendant also does not dispute that although the interim order gave joint physical custody of the children to both parties, defendant had primary physical custody of the parties' son and plaintiff had primary physical custody of the parties' minor daughters. At trial, defendant clearly indicated that custody was not an issue. In fact, in his written closing argument, he indicated that he and plaintiff had agreed that he would retain *physical* custody of the parties' son and plaintiff would retain *physical* custody of the daughters. Notwithstanding that agreement, defendant now complains that the trial court should have granted joint physical custody. We are required to affirm rulings in child custody matters unless the trial court's findings of fact are "against the great weight of the evidence," its discretionary rulings amount to a "palpable abuse of discretion," or the trial court committed "clear legal error" on a major issue. MCL 722.28; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994); *York v Morofsky*, 225 Mich App 333, 335; 571 NW2d 524 (1997). In this case, none of the trial court's findings of fact were against the great weight of the evidence, the discretionary rulings were not a palpable abuse of discretion, especially when defendant's position at trial is considered, and there were no errors of law. Thus, we affirm the trial court's custody decision.

We also affirm the trial court's visitation schedule.

[This Court's] review of a visitation order is de novo, but [it] will not reverse the order unless the trial court made findings of fact against the great weight of the evidence, committed a palpable abuse of discretion, or committed a clear legal error. Visitation shall be granted if it is in the best interests of the child and in a frequency, duration, and type reasonably calculated to promote a strong relationship between the parent and the child. The controlling factor in determining visitation rights is the best interests of the child. [*Deal v Deal*, 197 Mich App 739, 741; 496 NW2d 403 (1993)(citations omitted).]

In this case, the trial court's visitation order was not an abuse of discretion and did not amount to a clear legal error. The parties appeared incapable of engaging in visitation with the children unless a rigid schedule was put into place. A strict, limited visitation schedule was in place during the pendency of the divorce and yet the parties could not comply with that schedule without intervention from the court. We find that the visitation schedule ordered by the trial court was of a frequency, duration, and type reasonably calculated to foster the relationship between each parent and the children together. The schedule, while not allowing frequent parenting by both parties with all three children, was realistic. It appears that the teenage children did not want to spend any time with their noncustodial parent. Forcing further visitation may have had a worse effect on the relationships between the children and the parties. The parties are granted parenting time with all three children every other weekend, share the numerous yearly holidays, and are each given two-week blocks of parenting time in the summer.

Defendant fails to cite any facts to support his assertions that more parenting time is needed and he fails to persuade this Court that more frequent visitation would be appropriate and workable. Thus, we affirm the visitation order and, as the trial court stated, we agree that it is the duty of each party to cooperate with the visitation of the children with the other party.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Harold Hood

/s/ Mark J. Cavanagh