

STATE OF MICHIGAN
COURT OF APPEALS

ROMAN S. BIER,

Plaintiff/Counterdefendant-
Appellant,

v

DEBRA A. BIER,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED
February 21, 2006

No. 254535
Macomb Circuit Court
LC No. 02-006021-DO

Before: Murray, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right from the judgment of divorce. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff first argues that the trial court's factual finding that plaintiff was an equal owner with his father of seven parcels of real estate owned by a corporation known as Rockwell Ventures was clearly erroneous. We agree as to four of the properties, but not as to the other three. In reviewing a divorce action, we will uphold a trial court's findings of fact unless they are clearly erroneous and a dispositional ruling unless firmly convinced that it is inequitable. *Stoudemire v Stoudemire*, 248 Mich App 325, 336-337; 639 NW2d 274 (2001). If the trial court's view of the evidence is plausible, this Court may not reverse unless it is left with a definite and firm conviction that a mistake has been committed. *Beason v Beason*, 435 Mich 791, 804-805; 460 NW2d 207 (1990). However, conclusions of law, including erroneous applications of law to facts, are reviewed de novo. *Id.* at 805.

As to the seven properties, the trial court found that plaintiff was an equal owner with his father of Rockwell, which the court concluded consisted of all seven parcels in issue. However, plaintiff's father testified that four of the seven properties were titled in his name. These parcels are located at 6143 University Place,¹ 6147 Bluehill, 19129 Teppert, and 11740 Lansdowne.

¹ The judgment of divorce provides that this property is located at 6145 University Place. We presume that this is a typographical error.

These properties were transferred to plaintiff's father before the parties' marriage. Because of the undisputed evidence below, we conclude that plaintiff's father solely owned these four parcels, so the trial court's findings are clearly erroneous as to those properties. As to the remaining three properties located at 6134 University Place, 18619 Gable, and 18651 Carrie, plaintiff's father testified that these properties remained titled in Rockwell.

Plaintiff argues that the evidence and testimony did not demonstrate that he had sufficient indicia of ownership of the corporation to find that he was an equal owner in Rockwell.² We disagree. "Co-ownership of [a] business requires more than merely joint ownership of the property and is usually evidenced by joint control and the sharing of profits and losses." *Miller v City Bank & Trust Co*, 82 Mich App 120, 124; 266 NW2d 687 (1978). However, corporate control is not necessarily synonymous with ownership. *Blue Cross & Blue Shield of Michigan v Governor*, 422 Mich 1, 114 n 27; 367 NW2d 1 (1985) (Levin, J., separate opinion). In addition, collecting and reporting income received from property is strong indicia of ownership. See *Donahue v Donahue*, 134 Mich App 696, 705-707; 352 NW2d 705 (1984). Finally, "[c]omplete identity of interest between sole shareholder and corporation may lead courts to treat them as one for certain purposes." *Kline v Kline*, 104 Mich App 700, 702; 305 NW2d 297 (1981).

Initially, we note that trial testimony suggests that plaintiff's father treated himself and Rockwell as the same. For example, the testimony showed that plaintiff's father gave the parties a loan in the form of a check from Rockwell to help them purchase a house. Plaintiff's father also allowed plaintiff to use a Rockwell check to make a mortgage payment after the parties separated, which plaintiff's father testified was effectively a loan from himself to plaintiff. Additionally, Rockwell transferred certain parcels of property back to plaintiff's father so that he could acquire a loan. Plaintiff's father further characterized Rockwell as "an in-house corporation."

As to plaintiff's ownership, defendant testified that plaintiff bragged about owning the properties before their marriage. Defendant admitted that plaintiff may have been "bragging a little bit, maybe, to try to win [her] over," but she also testified that plaintiff regularly spent time working on those properties, even during the marriage.

The evidence also showed that plaintiff was a signatory on the corporate account and that plaintiff and his father exchanged signatures, but the evidence did not indicate any occasion where plaintiff used either without his father's permission. Further, although plaintiff borrowed money from the corporation, he also paid it back, indicating that plaintiff, unlike his father, did not treat the corporation as an extension of himself. Plaintiff was also listed as an officer of Rockwell. However, being an officer of a corporation does not necessarily mean that the listed officer is an owner of the corporation. In addition, there was undisputed testimony from plaintiff's father that he paid taxes on and collected rent on several pieces of property but that neither plaintiff nor defendant contributed to or collected anything from any of the properties.

² Plaintiff's father testified that no stock certificates were issued in Rockwell.

Given that a trial court's findings of fact should be upheld if plausible on the basis of all of the evidence, *Beason, supra* at 805, we are not left with a definite, firm conviction that a mistake has been made regarding plaintiff's co-ownership of the three properties in issue.

Plaintiff also argues that the trial court erroneously determined that the marital portion of the seven properties were subject to division. We review for clear error a trial court's findings of fact regarding whether a particular asset qualifies as marital or separate property. See *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002).

In a divorce, the disposition of property is controlled by statute. MCL 552.1 *et seq.* A "trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets." *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Generally, marital assets are subject to being divided between the parties, but separate assets may not be invaded. *McNamara, supra* at 183. Assets earned by a spouse during a marriage are generally considered marital assets. *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997). Generally, separate assets include property owned by one party prior to a marriage. See *Lee v Lee*, 191 Mich App 73, 77-79; 477 NW2d 429 (1991).

There are two statutory exceptions that allow separate assets to be invaded. First, invasion is permitted if after division of the marital assets "the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party . . ." MCL 552.23(1); accord *Reeves, supra* at 494. Second, invasion is allowed when the other spouse "contributed to the acquisition, improvement, or accumulation of the property." MCL 552.401. In addition, "[w]hen one significantly assists in the acquisition or growth of a spouse's separate asset, the court may consider the contribution as having a distinct value deserving of compensation." *Reeves, supra* at 495. In that regard, an appreciation in value during the marriage of a party's premarital asset is not considered a marital asset if the appreciation was wholly passive. *Id.* at 497. However, if appreciation is due to contributions made by a spouse during the marriage, the asset is subject to division as a marital asset. *McNamara, supra* at 184-185.

As to the four properties owned by Bier Sr., the trial court clearly erred in awarding the marital value of these properties to defendant. As to the remaining three properties, the trial court found that defendant's efforts contributed to the increase in value of the real estate during the course of their marriage. While there was conflicting testimony about the amount of time defendant expended in maintaining the properties, this Court gives special deference to findings based on credibility. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Therefore, as to the remaining three properties, the trial court did not err in awarding defendant her marital share.

On a related matter, plaintiff argues that the trial court erred in not taking into account the premarital value of the properties when including them in the marital estate. We agree. On remand, the trial court should make specific findings as to the premarital and marital value of the three properties individually before dividing the value. Again, the four properties owned by plaintiff's father are not to be considered.

Plaintiff next argues that the trial court's award of spousal support was erroneous. This Court reviews a spousal support award for an abuse of discretion. *Gates v Gates*, 256 Mich App

420, 432; 664 NW2d 231 (2003). An abuse of discretion has occurred only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, 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. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). In addition, a trial court's findings of fact in relation to spousal support are reviewed for clear error. *Gates, supra* at 432. Further, the findings are presumptively correct and the burden is on the appellant to show clear error. *Id.*

“The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party, and alimony is to be based on what is just and reasonable under the circumstances of the case.” *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).

Among the factors that 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. [*Id.*]

Plaintiff only challenges factors six and eight, contending that he will lose the ability to pay and that defendant does not need what he is paying.

Plaintiff's challenge to his ability to pay concerns the future, not the situation at the time the judgment was entered. In other words, plaintiff does not contend that his income at the time of the judgment of divorce was too low for him to afford the spousal support payments. On the contrary, the spousal support award of \$1,191.67 a month is less than the \$1,400 or \$1,500 mortgage payments that plaintiff was paying prior to the entry of judgment. During this time, plaintiff was able to accumulate savings. Because the evidence shows that the spousal support award was within plaintiff's ability to pay when it was entered, we conclude that his challenge to his ability to pay prior to entry of the judgment is without merit.³

Plaintiff also challenges defendant's need for the award of spousal support. In exercising its discretion to award alimony, a “trial court should make specific findings of fact regarding those factors that are relevant to the particular case.” *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993).

³ The judgment indicates that spousal support is modifiable.

Here, the trial court found that, at the time of trial, plaintiff had earned an average annual income of approximately \$87,500 over the previous two years and that defendant's annual expenses including the mortgage exceeded her annual income of approximately \$35,000. Further, the court found that both parties were in good health and enjoyed a good standard of living during their marriage. Finally, the court acknowledged the substantial difference in the parties' respective incomes noting that it was unlikely defendant's income would ever increase. We conclude that the trial court's findings are not clearly erroneous. Further, while the support award may have been slightly higher than defendant's needs at the time of trial, the award appears to be just and reasonable under the circumstances.

Plaintiff finally argues that the trial court abused its discretion in awarding defendant attorney fees.⁴ We disagree. A trial court's decision whether to award attorney fees in a divorce action is reviewed for an abuse of discretion. *Olson, supra* at 634.

Attorney fees in divorce actions may be awarded if the record supports a finding that the party to whom they are awarded is unable to bear the expense of the litigation. *Id.* at 635. More specifically, "[i]t is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Gates, supra* at 438.

Defendant testified that she had \$20,000 in credit card debt, \$5,000 of which plaintiff paid pursuant to the judgment of divorce. Defendant testified that she takes home approximately \$2,100 from her job and receives \$70 a week in child support, which adds up to less than her expenses. She also testified that she could not pay her \$12,000 in attorney fees without selling some of her property. None of the above testimony was contested, and there was no evidence presented on whether defendant had any assets other than those awarded to her by the judgment of divorce for her support. Therefore, because the uncontested evidence showed that defendant could not afford her attorney fees without invading her assets and indicated that defendant had essentially no assets other than those awarded for her support, the trial court did not abuse its discretion in awarding attorney fees.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with its opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Mark J. Cavanagh

/s/ Henry William Saad

⁴ The attorney fee award of \$12,000 only covered attorney fees incurred up to December 2003. Thus, the award of attorney fees did not cover the entire expense of litigation. Indeed, the judgment of divorce provided that the parties were both responsible for any further balances of attorney fees.