

STATE OF MICHIGAN
COURT OF APPEALS

RAMONA ROBERTS,

Plaintiff-Appellee,

v

ORLANDO ROBERTS,

Defendant-Appellant.

UNPUBLISHED

August 21, 2003

No. 238610

Genessee Circuit Court

LC No. 98-206814-DO

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. We affirm in part, reverse in part, and remand.

Defendant's first issue on appeal is that the trial court's exclusion of a legal referral fee from the marital estate amounted to clear error. We agree. The applicable standard of review when determining property division of the marital estate was reiterated by this Court in *Dragoo v Dragoo*, 223 Mich App 415, 429-430; 566 NW2d 642 (1997):

In a divorce case, this Court must first review the trial court's findings of fact regarding the valuations of particular marital assets under the clearly erroneous standard. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *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.* This Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses. *Thames v Thames*, 191 Mich App 299, 302; 477 NW2d 496 (1991). If the trial court's findings of fact are upheld, this Court must decide whether the dispositive ruling was fair and equitable in light of those facts. The dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); *Sparks, supra* at 151-152.

The lower court file reveals that plaintiff, while working as an attorney in private practice, handled a personal injury case, and that, when plaintiff was elected to the bench, she referred the case to another attorney. Ultimately, the case settled, and plaintiff received a referral fee of \$200,000. It is undisputed that plaintiff's work related to the case and the payment of the

referral fee occurred during the marriage. Yet, the trial court ruled that the referral fee was not part of the marital estate. The trial court provided:

[T]he asset is like an inheritance. The Referral Fee in Equity, should be treated like a lottery ticket or an invention. It purely has potential value. It had little or no actual value, before the money was received. Therefore, the Court finds that the Referral Fee is a separate asset and should be retained by the Plaintiff.

It is well settled that income earned during the course of a marriage is deemed part of the marital estate. *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997). The trial court's analogy to an inheritance is flawed. Generally, property obtained during a marriage as an inheritance, and kept separate during the marriage, is excluded from the marital estate. See, e.g., *Dart v Dart*, 460 Mich 573, 584-585; 597 NW2d 82 (1999). However, in this case, plaintiff indicated that she deposited the money into a joint checking account, and used the money to pay, among other things, bills related to defendant personally, as well as defendant's dental practice. Moreover, as the trial court found, "over one half of the fee went to marital debts, expenses, and things." In this sense, the money was not kept separate from the marriage. The referral fee should have been considered part of the marital estate, subject to equitable division.

Defendant's second issue on appeal is that several of the trial court's findings of fact were clearly erroneous. Defendant first contends that the trial court clearly erred when it found that defendant had participated in two extramarital affairs. We disagree. As noted, *supra*, we review the findings of fact for clear error, and a finding is not clearly erroneous unless, after a review of the entire record, we are left with the definite and firm conviction that a mistake has been made. *Dragoo, supra* at 429-430. We give special deference to a trial court's findings when based on the credibility of the witnesses. *Id.*

The only evidence of defendant's "infidelity" was plaintiff's testimony that she suspected he was having an affair. Plaintiff based her suspicions on seeing defendant dance with some of his co-workers at an office party, as well as what she believed was a concerted effort to keep her away from defendant's office. Plaintiff conceded that she never saw defendant in bed with anyone or kissing anyone, but did state that she "seen lipstick and stuff all on him . . . the late hours he would keep, not coming home, those kind of things." Defendant stated that he was not having an affair, and plaintiff's counsel did not cross-examine him on the issue. The trial court found that defendant was not credible. Although there is only a paucity of evidence supporting the trial court's finding that defendant was engaged in an extramarital affair, giving special deference to the trial court's findings with regard to credibility, we are not left with a firm conviction that a mistake has been made.

Defendant next asserts that the trial court's finding that he depleted marital assets in pursuing his business ventures was clearly erroneous. Similarly, defendant contends that the trial court's finding that defendant threatened plaintiff was also clear error. We disagree. Plaintiff testified that a second mortgage was taken out on the marital home to pay off defendant's business debts. Defendant, himself, acknowledged that "a major portion [of the money obtained from the second mortgage] went to pay business debts." Moreover, significant evidence was admitted about defendant's use of the marital home as collateral on a loan to begin construction of a new office building on Lennon Road. Defendant took out a third mortgage on the house in order to facilitate construction on the office building. Finally, plaintiff testified that her assets

were used to pay off defendant's business loans and bills. From this evidence, we cannot conclude that the trial court's findings amount to clear error.

Similarly, plaintiff testified that she moved out of the house because she felt threatened. Although plaintiff did not state defendant struck her, she did indicate that defendant approached plaintiff "with his fists balled up, eyes flashing, getting ready to attack" her. In addition, plaintiff indicated that she signed the forms associated with the third mortgage on the marital home under "duress." From this testimony, we cannot conclude that the trial court's finding that plaintiff left the marital home because she felt threatened is clearly erroneous.

Defendant also takes issue with the trial court's finding that he was disinterested in, and failed to contribute to the marriage. While defendant does not argue that such a factual finding is erroneous based on the facts after 1992, he contends that, by 1992, the marriage had already broken down. For support of this contention, defendant refers to plaintiff's testimony that the marriage had broken down in 1992, at approximately the time of plaintiff's reelection campaign, and was "irreconcilable." Defendant reasons that any finding based on facts which occurred after that point cannot relate to the issue of fault, because the marriage was, according to plaintiff's testimony, over at that point. Defendant asserts that the trial court's findings on the issue of fault should be limited to the facts before 1992. We disagree. The facts set forth at trial show that although plaintiff indicated that she wanted to get a divorce, she continued to live in the marital home. The record reflects that the parties separated in March 1997, and the divorce was filed in 1998. Therefore, it is questionable what significance plaintiff's expression of an interest in a divorce before that time should have, and the trial court did not err in making its findings using facts subsequent to 1992.

Defendant fails to cite any applicable authority for his contention that the trial court should not look at any factors which may have followed a party's expression that the marriage is "irreconcilable." Defendant's reliance on *Knowles v Knowles*, 185 Mich App 497, 500; 462 NW2d 777 (1990), is misplaced, as that case involved the trial court's consideration of an adulterous affair that a party had four months after the divorce petition was filed. *Knowles, supra* at 500. In *Knowles, supra*, this Court indicated that the trial court is to consider events which occur before the filing of a divorce petition. Defendant also directs this Court to *Zecchin v Zecchin*, 149 Mich App 723, 728; 386 NW2d 652 (1986), where we indicated that the "[t]he focus must be on the conduct of the parties leading up to the separation rather than on who left whom." However, *Zecchin, supra*, does not support defendant's position, as the Court implicitly ruled that anything leading up to the separation could properly be considered. These cases cut against defendant's argument, in that they look to a specific point in the marriage, either the separation or the filing for divorce, as a boundary beyond which conduct will not be considered for the purpose of determining fault. Defendant offers no authority for the proposition that such a boundary can be found where one party expressed some consideration of a possible divorce. Accordingly, defendant's argument that the trial court impermissibly considered facts which occurred after the marriage was irreconcilably over is without merit.

Defendant also contends that the trial court erroneously relied¹ on post-separation conduct when it found that defendant "disobeyed the Court's Orders not to borrow, encumber, or

¹ We note that defendant limited his arguments to whether the trial court should have relied on
(continued...)

deplete marital assets.” We agree that the conduct necessarily occurred after the divorce had been filed. Pursuant to *Knowles, supra*, the trial court’s reliance on a factor that occurred after the divorce petition was filed amounts to error. *Id.* at 50. However, while such a factor may not be used to determine whether fault occurred with regard to the breakup of the marriage, the trial court may consider this factor when fashioning an equitable division of the property. See, e.g., *Sands, supra* at 32-34 (ruling that the trial court abused its discretion by failing to consider that a party concealed assets during the divorce process). Because a trial court may consider factors such as a party’s concealment of assets, defendant fails to show that the trial court erred in considering that defendant encumbered marital assets contrary to the trial court’s order. Thus, although the trial court erred in considering this factor with regard to fault, it was not improper for the trial court to use this factor in fashioning a remedy. See, generally, *Sands, supra* at 32-34.

Defendant also argues that the trial court erred in concluding that defendant’s income and business practice would be more comparable to plaintiff’s if he was “more aggressive” in his business. Defendant maintains that no testimony was taken on the earning levels of dentists in the area, so the trial court clearly erred in making a finding on what defendant could earn. We disagree. Defendant’s partner testified that his practice has seen a great increase since the move to the new office, whereas defendant testified that his salary in 1997 was roughly \$52,383, which is only slightly more than the \$47,476 he made in 1986. This was so, even though defendant and his partner had essentially the same type of practice, and worked the same hours. Based on this evidence, the trial court fairly concluded that defendant was not aggressive in satisfying his income earning potential. Defendant has failed to show how the trial court’s finding of fact amounted to clear error.

Defendant also takes issue with the trial court’s findings of fact with regard to his credibility. In delivering its reasons for the judgment, the trial court indicated, “One thing that prevailed throughout the trial was the ability to get candid answers of the defendant. Seems like he did answer questions when they benefited him.” The trial court proceeded to give examples of defendant’s unwillingness to be forthcoming. While defendant acknowledges that credibility determinations are uniquely the province of the factfinder, see *Mahrle v Danke*, 216 Mich App 343, 352; 549 NW2d 56 (1996), he points out that the specific examples given by the trial court were insignificant, as they related to only small amounts of money. This reasoning is flawed. The trial court expressed its conclusion that it did not believe defendant’s testimony. In support of that conclusion, the trial court provided a few examples which led it to that conclusion. However, the trial court expressed that those were only examples of defendant’s lack of credibility, and not an exhaustive list detailing all instances when defendant could not be believed. Therefore, it stands to reason that there could be more instances, and possibly those instances could include larger sums of money. Accordingly, we are not persuaded that the trial court’s determination that defendant’s testimony lacked credibility was clearly erroneous.

Finally, defendant asserts that the trial court erred in finding that defendant depleted marital assets by failing to pay the property taxes on the Woodland Park property, which resulted in the property being sold in a tax sale. Defendant asserts that the property only consisted of a

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this factor, and not whether the trial court clearly erred when it made such a finding.

small lot and a trailer, and that defendant bought the property for only \$2,000 before the marriage. Defendant appears to suggest that because he paid for the property before the marriage, and because it was not worth much, the trial court should not have considered it. To the extent that defendant argues the trial court should not have considered it as marital property, we agree. See *Byington, supra*. However, this does not mean that the trial court should not have considered it at all. Plaintiff testified that the property was formerly owned by her grandfather, and was in an area that had been in her family “for generations.” Moreover, plaintiff contended that, although they had paid the property taxes on the land during the marriage, defendant failed to respond to the tax bills after she moved out of the marital home. Plaintiff believed that the failure to pay the taxes on the property was intentional. Because of the sentimental value of the property to plaintiff, and because of the manner in which defendant neglected to pay the taxes, in light of plaintiff’s feelings toward the land, the trial court did not clearly err in considering the loss of the property. Defendant shows no error associated with consideration of this property.

Defendant’s final issue on appeal takes issue with the trial court’s use of the various findings of fact to effectuate a sixty percent to forty percent property split in favor of plaintiff. The distribution of marital property by the trial court is governed by statute. MCL 552.19; *Reeves v Reeves*, 226 Mich App 490, 493; 575 NW2d 1 (1997). MCL 552.19 provides:

Upon the annulment of a marriage, a divorce from the bonds of matrimony or a judgment of separate maintenance, the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party by reason of the marriage, or for awarding to either party the value thereof, to be paid by either party in money.

In *McNamara v Horner*, 249 Mich App 177, 185-186; 642 NW2d 385 (2002), a panel of this Court reiterated the following rules related to equitable divisions of property:

In reaching an equitable division of the marital estate, the trial court is to consider the following factors whenever they are relevant to the circumstances of the particular case:

- (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity.

Because of the wide array of factual circumstances involved in a divorce proceeding, the determination of relevant factors varies depending on the case. Hence, there is no rigid framework for applying the relevant factors. Nonetheless, where any of these factors are relevant to the value of the property or to the needs of the parties, the trial court must make specific findings of fact regarding those factors. In so doing, the trial court must not assign disproportionate weight to any one circumstance. [Internal citations omitted.]

Defendant first contends that the trial court's finding that defendant was messy is irrelevant to allocate property. Defendant contends that such a factor is not so significant as to amount to a "moral failing" which should serve to "penalize" him in a split of assets. In support of defendant's argument, he only offers language from *McDougal v McDougal*, 451 Mich 80, 90 n 7; 545 NW2d 357 (1996), where the Supreme Court distinguishes between elements that are only unfortunate, and not outrageous.

Assuming defendant is correct that the language from *McDougal, supra*, sets forth the test to measure whether a factor should be considered when dividing marital property, his argument still fails. There was significant evidence adduced at trial about defendant's slovenliness, and his lack of upkeep with regard to the marital house. There were holes in the roof of the marital home, and vermin living within it. A sheriff's deputy testified that the house was in worse condition than any crack house he had been to. Garbage was strewn across the house, and the carpeting was "terrible." Other evidence of the extremely poor condition of the property was admitted in the form of testimony by a contractor, as well as by way of photographic evidence. This evidence showed not only the depletion of a marital asset, it also showed why plaintiff felt forced to leave the home. Thus, it was a significant factor as to whose fault it was the marriage failed.

Aside from this specific argument, defendant also alleges that, generally, the trial court's division of property was inequitable. Defendant contends that the sixty percent share of the marital asset awarded to plaintiff, which was presumably based on defendant's fault for the separation of marriage, was unfair. As determined, *supra*, the issues raised by defendant with regard to the trial court's findings of fault were not clearly erroneous, except for the error in considering defendant's actions that occurred after the divorce had been filed, which were disobeying the trial court's order not to borrow, encumber or deplete marital assets. However, as previously noted, the trial court may consider a party's concealment of assets when fashioning an equitable distribution of the assets, and, similarly, should be able to consider post divorce depletion or encumbrance of assets, against a court order, in fashioning an equitable distribution of assets. See, generally, *Sands, supra* at 32-34. Thus, the trial court's award of sixty percent of the marital assets to plaintiff was not clearly erroneous or inequitable, and is affirmed.

Because the trial court failed to consider plaintiff's referral fee as a marital asset subject to equitable division, we reverse and remand to the trial court to enter a judgment recognizing the referral fee as marital property. On remand, we direct the trial court to make further findings with regard to value of the referral fee at the time of trial, and to split the referral fee consistent with the trial court's property distribution of sixty percent to plaintiff and forty percent to defendant. See *Byington, supra*.

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

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly