STATE OF MICHIGAN

COURT OF APPEALS

LAURIE ANN TUINSTRA, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED March 14, 2006
v	No. 258091 Kalamazoo Circuit Court
STEPHAN WAYNE TUINSTRA, Defendant-Appellant/Cross-Appellee.	LC No. 03-006395-DM

Before: Owens, P.J., and Saad and Fort Hood, JJ.

PER CURIAM.

In this divorce action, both parties appeal aspects of the trial court's property settlement. We affirm in part, reverse in part, and remand for further proceedings.

I. Loans

Defendant argues that the trial court erred when it excluded from the marital estate three loans from his family members that totaled $210,000.

This Court reviews a property distribution in a divorce case by first reviewing the trial court's factual findings for clear error, and then determining whether the dispositional ruling was fair and equitable in light of the facts. *Olson v Olson*, 256 Mich App 619, 622; 671 NW2d 64 (2003). "The 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; 575 NW2d 1 (1997). This Court has held that, if the trial court determines that certain "joint" debts are actually the individual obligations of one of the parties, the court may exclude the debt from the marital estate. *Reed v Reed*, 265 Mich App 131, 156-157; 693 NW2d 825 (2005), citing *Lesko v Lesko*, 184 Mich App 395, 401; 457 NW2d 695 (1990).

In its written opinion, the trial court noted that the parties disagree whether the three transactions constituted loans or gifts. However, the court ruled that, while the money was "used to help support the family and the appraisal business," defendant's decision to repay the money shortly after the parties' separation indicates a "likelihood" that defendant was "removing assets from the marital estate." However, the trial court fell short of ruling, as a factual matter, that defendant actually concealed or stole marital assets. Further, the trial court did not explicitly rule that defendant had already repaid the loans during the marriage or that, in the guise of

repayment, he temporarily shifted marital assets to his mother after the separation. The trial court ruled, however, that defendant failed to fully explain the loan transactions to his wife and that defendant entered the transactions without plaintiff's knowledge or consent. Specifically, the trial court stated that "the evidence is that the Husband and his mother . . . created financial obligations against the marital assets without the knowledge or consent of the Wife which the Wife should not be charged in the division of property." Accordingly, the trial court ruled that the loans were defendant's individual obligation and not debts of the marital estate.

Defendant correctly asserts that the trial court clearly erred when it ruled that there is a dispute regarding whether the loans were, in fact, gifts. Though plaintiff initially stated that she and defendant received $100,000 as a "gift," she immediately conceded that it was a loan and plaintiff did not testify that the other disputed amounts, $30,000 and $80,000, were gifts. Further, the trial court clearly erred when it ruled that plaintiff did not know about the loans. Plaintiff testified that she knew about two of the loans, one for $30,000 and the other for $100,000. With regard to the third loan for $80,000, plaintiff first testified that she did not know about the loan. Later in her testimony, however, plaintiff retreated from her earlier position and clarified that she just did not know the details of how the $80,000 loan took place.

Furthermore, with regard to the timing of repayment, Margaret Tuinstra testified that she requested repayment of the loans before the parties separated, but she insisted on immediate payment when plaintiff announced the separation. Moreover, the September 23, 1999 promissory note that reflects all of the loans states that the total amount was payable "on demand" and, therefore, it was Margaret's prerogative to demand repayment at any time. Margaret also specifically denied that she returned any of the money to defendant and no evidence shows that Margaret is holding the money for defendant's benefit.

The only disputed material issue was whether defendant repaid the $30,000 loan during the marriage and whether the $100,000 loan was forgiven when defendant's grandfather died in August 1999.[1] The trial court did not hold that the loans were repaid or forgiven, but that defendant unilaterally borrowed and repaid the money and that, therefore, defendant should be solely responsible for the debts. However, plaintiff's lack of participation in negotiations or promissory notes for two of the loans does not mean that plaintiff objected to the loans or that she did not benefit from them during the marriage. Evidence showed that much of the money was used for investments, to buy or improve real estate held by both defendant and plaintiff, or to benefit the appraisal business – the sole source of marital income. Accordingly, while plaintiff may not have signed all of the promissory notes, no evidence shows a failure to consent to them. Further, the evidence does not establish that the money only benefited defendant so as to make them entirely his responsibility. *Reed, supra* at 157; *Lesko, supra* at 401.

Accordingly, and because evidence does not support the trial court's decision to exempt the loans from the marital estate, we reverse the trial court's ruling on this issue and remand for the trial court to correct the property settlement in the judgment of divorce.

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[1] Plaintiff does not contend that defendant repaid the $80,000 loan.

II. Real Property and Vehicle

We reject defendant's argument that the trial court erred in its determination of the value of certain property in the marital estate.[2]

The trial court did not clearly err when it determined the value of the Dunross property as $423,000. Evidence established that an offer was made to the buy the property for $423,000. "[W]here a trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present." *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). Moreover, defendant will not be heard to argue that the property was overvalued at the time of trial when he testified that he believed the property was worth in excess of $60,000 more.

Further, the trial court did not err when it failed to include inchoate expenses required to sell the Dunross property, such as fees or tax consequences. In *Nalevayko v Nalevayko*, 198 Mich App 163; 497 NW2d 533 (1993) this Court ruled that "if in the opinion of the trial court the parties have presented evidence that causes the court to conclude that it would not be speculating in doing so, it may consider the effects of taxation, stock brokerage and realtor fees, and other inchoate expenses in distributing the assets." *Id*. at 164. While it appears that plaintiff and defendant sold the property after the trial but before the trial court issued its decision and order, nothing in *Nalevayko required* the trial court to take into account the expenses incurred during the sale or Stephen's actual *net* proceeds in selling the house. The *Nalevayko* language is clearly permissive and the trial court's consideration of those expenses is within its sound discretion. *Id*.

With regard to the Cooley property, plaintiff's expert, Patrick Stanley, testified that the property is worth $110,000. Because the trial court's valuation of the property was clearly within the range established by the proofs, the trial court did not clearly err. *Jansen*, *supra* at 171.

Defendant also claims that the trial court overvalued the Schoolcraft farm at $268,000. He cites no authority for his claim that the trial court was required to reduce the value by the amount of past due taxes. Again, this consideration is discretionary. *Nalevayko, supra* at 164. Further, the trial court relied on expert testimony from Stanley to establish the value of the property and defendant did not offer a competing value. Accordingly, the trial court's valuation was not clearly erroneous. *Jansen, supra* at 171.

The trial court awarded one-half interest in the Wimbledon condominium to defendant at a value of $48,000. Defendant acknowledges that Stanley valued the entire Wimbledon property at $96,000, but he asserts that the trial court erred because plaintiff signed a listing for the

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[2] We reject defendant's claim that the parties entered a stipulation that they would sell all of the properties and split the proceeds. The parties did not place on the record any agreement regarding the properties prior to trial and the values and distribution of the properties were clearly disputed by the parties during trial.

property for $88,900. Again, the trial court was entitled to rely on the testimony of an expert on the value of the property and we will not disturb the valuation on appeal.

Defendant contends that the trial court should have charged plaintiff an additional amount for the Omega property. Plaintiff bought the home on Omega after she separated from defendant and she used $40,964 from the marital estate for the down payment. Accordingly, the trial court charged plaintiff for the $40,964 in the divorce judgment. Defendant argues that the trial court should have added $5,500 to defendant's charge for the property because she admitted that the price of the house, $363,900, also included some rent that was not part of the value of the home. We hold that the trial court did not make a determination regarding the value of the Omega property because it was not part of the marital estate. Instead, the trial court correctly charged plaintiff for the amount she withdrew from the marital estate to purchase the home and this ruling was not clearly erroneous.

Defendant also challenges the value the trial court attributed to the Chevrolet Suburban. The parties presented competing evidence on the value of the vehicle. The trial court relied on plaintiff's evidence and, because the value was supported by the proofs, we affirm the trial court's decision. *Jansen, supra*.

III. Jewelry and Tractor

Defendant complains that the trial court predetermined that certain pieces of jewelry were gifts to plaintiff and wrongly excluded them from the estate. "A dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *McNamara v Horner (After Remand)*, 255 Mich App 667, 670; 662 NW2d 436 (2003). If one party during a marriage acquires a gift or inheritance, it is within the trial court's discretion whether to include it in the marital estate. *Charlton v Charlton*, 397 Mich 84, 94; 243 NW2d 261 (1976). If the gift or inheritance was commingled with the marital property or used for joint purposes, the trial court may, in its discretion, include it in the property distribution. *Id*.

Here, while the trial court noted that, often, jewelry is given as a gift, plaintiff specifically testified that she received the jewelry as a gift. Further, it was not improper for the trial court to ask plaintiff whether she received the jewelry as a gift because the trial court was required to determine whether each piece of disputed property was part of the marital estate. *Reeves, supra* 493. It is also well-settled that "[q]uestions designed to clarify points and to elicit additional relevant evidence, particularly in a nonjury trial, are not improper." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 24; 436 NW2d 70 (1989); MRE 614(b).

Again, plaintiff testified that she received the pieces of jewelry as gifts from defendant. Defendant asserts that the jewelry was commingled with the marital estate because they paid premiums to insure some of the jewelry and he claims that he used marital assets to purchase the pieces. Defendant did not present evidence to the trial court that the jewelry was actually purchased with marital assets. Further, while defendant submitted insurance documents to the trial court to establish the value of the jewelry, defendant did not argue below that the jewelry was marital property merely because the items were insured. We are not left with the firm conviction that the trial court's decision to award the jewelry to plaintiff was inequitable.

With regard to the tractor, defendant testified that his mother, Margaret Tuinstra, gave him a check for $10,000 to buy the Kubota tractor on or about June 21, 2001. In contrast, plaintiff testified that she did not know that the tractor was a gift until she heard defendant testify at trial. Plaintiff further testified that the family used the tractor to cut grass at their family home on Dunross. According to plaintiff, the tractor was used by defendant, her sons, and herself for that purpose and that they kept the tractor at the house on Dunross until defendant moved it to the Schoolcraft farm when the parties separated. Plaintiff further maintained that the family ultimately planned to use the tractor on the Schoolcraft farm.

In contrast to the jewelry, ample evidence established that, regardless whether the tractor was originally given to defendant as a gift from his mother, it was commingled with the marital property and used for joint purposes. *Charlton*, *supra* at 94. Evidence established that each of the family members used the tractor to maintain the family home and that the family planned to also use it on the family farm. The trial court, therefore, did not err when it included the tractor in the marital assets.

IV. Horse Equipment and Bikes

Defendant argues that the trial court erroneously ruled that certain property, including horses, horse equipment and trailer, and two dirt bikes should not be included in the marital estate.

A "circuit court has no jurisdiction in a divorce case to compel a party to convey property or a property interest to a third person, even a child of the parties, or to adjudicate claims of third parties." *Krueger v Krueger*, 88 Mich App 722, 724-725; 278 NW2d 514 (1979); *Hoffman v Hoffman*, 125 Mich App 488, 490, 336 NW2d 34 (1983). In its determination regarding the horses, horse equipment, and dirt bikes, the trial court stated, "It is also appropriate that those items of personal property used primarily by the children including the horses, horse equipment and trailer; and two of the dirt bikes should not be considered part of the marital estate."

It was within the trial court's discretion to determine, based on plaintiff's trial testimony, that the dirt bikes were given to the two boys, David and Michael. Further, the record reflects that, though defendant claimed that they should be part of the marital estate, the parties' daughter Lisa held title to the horses. While defendant correctly notes that plaintiff failed to present documents that showed Lisa's name as the owner of the horses, defendant presented no evidence to the contrary. Accordingly, the trial court was free to believe plaintiff's testimony that Lisa owned them in her own name. Further, ample evidence established that Lisa, who was 16 years old at the time of trial, was the only family member involved in showing, riding and training horses. Indeed, Lisa worked with a professional horse trainer and, at times, lived with the trainer in order to continue her horse training education. It was, therefore, logical for the trial court to conclude that Lisa made primary use of both the horses and the horse equipment. However, defendant did present evidence that his name is on the title to the horse trailer, which is valued at $10,900.

Defendant characterizes the trial court's decision as an order to convey his property to third parties, his children. However, the trial court did not rule that, while defendant owned the property, he must convey it to Lisa, David and Michael. Further, the trial court did not rule that Lisa, David or Michael are the owners of the property as a matter of law. Rather, the trial court's

ruling may be reasonably interpreted as merely stating that the property should not be included in the marital estate because plaintiff and defendant had little to no interest in it. This Court has held that is not improper for a trial court to "determine[] the extent of defendant's interest in various properties for the purpose of adjudicating a fair and equitable division of marital property." *Reed, supra* at 158. Accordingly, the trial court did not clearly err in its findings of fact and did not act inequitably in excluding the property from the marital estate.

V. Property Not Awarded to Either Party

Defendant claims that, although the parties agreed that certain property was part of the marital estate, the trial court failed to award three items to either party: GM Bonus Bucks, a video camera, and the $1,200 childcare tax credit issued on August 8, 2003.

Defendant correctly states that the trial court made findings of fact with regard to the value of the property, but failed to award the property to either spouse. We conclude that the trial court erred by failing to distribute the property, as it was required to do in its judgment of divorce. MCR 3.211(B); *Yeo v Yeo*, 214 Mich App 598, 601; 543 NW2d 62 (1995). Accordingly, on remand, the trial court should determine how these items should be distributed.

VI. Support

On cross-appeal, plaintiff complains that the trial court improperly reduced the amount of support payments defendant must pay.

As this Court explained in *Olson, supra* at 71, "[t]he award of alimony is in the trial court's discretion. The *Olson* Court further opined:

> 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. 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*. at 71-72 (Citations omitted).]

"The voluntary reduction of income may be considered in determining the proper amount of alimony." *Moore v Moore*, 242 Mich App 652, 655; 619 NW2d 723 (2003). Again, however, this Court must first determine whether the trial court's findings of fact were clearly erroneous and then determine whether the award was fair and equitable under all of the facts. *Id.*

The record reflects that, in determining the amount of support for which he would be obligated, the trial court averaged defendant's income from 1999 to 2003. As noted, defendant owned and worked for a business, Tuinstra Professional Appraisal Service, as his sole source of

employment income. In 1999 defendant earned $12,653, in 2000 defendant earned $72,969, in 2001 defendant earned $108,738, in 2002 defendant earned $135,166 and in 2003 defendant earned $4,316. Thus, the trial court concluded that defendant's average income for the five-year period was $66,775.40. The trial court noted that defendant's 2003 income is "highly questionable due to the Husband's decision to summarily increase the compensation to the sister the month the parties separated." Nonetheless, the trial court did not conclude that defendant voluntarily reduced his income in order to avoid high support payments.

We are not convinced that the support award is inequitable. Plaintiff is correct to the extent that she asserts that defendant began to pay his sister, Debra Tuinstra, an additional $1,000 per week around the time of the separation. The record reflects that Debra Tuinstra made $13 per hour prior to the increase. However, testimony also established that Debra increased her work hours and took on additional responsibilities for the company. While we note that the timing and amount of the sudden increase is "questionable," it does not necessarily follow that the increase constituted a deliberate attempt by Stephen to decrease his income to avoid higher support payments. Further, Debra testified that she had repeatedly asked for additional compensation prior to the parties' separation and defendant's other employees testified that Debra worked hard and put in long hours. Accordingly, the trial court's ultimate decision not to impute part of Debra's increased salary to defendant was not erroneous or inequitable.

With regard to defendant's increased business expenses and decreased income, we do not conclude that the trial court erred or abused its discretion. While some evidence showed that, immediately after the separation, defendant began to incur significant business debts, including the new office and equipment leases, other evidence showed that defendant had contemplated a move for some time prior to the separation. Defendant also presented evidence that business slowed because he lost numerous large clients and interest rates increased, and plaintiff did not rebut that evidence. Furthermore, while it appears that defendant incurred all of the additional business debts after the separation, his income for 2003 also included seven months of work he performed before he and plaintiff separated. Thus, the record does not establish that defendant intentionally reduced his salary after the separation. Moreover, defendant testified that he found it necessary to do fewer appraisals himself so that he could market to new customers and he reduced his hours because he needed to spend more time taking care of responsibilities around the home that plaintiff had previously performed. Plaintiff also failed to rebut this evidence at trial.

We further note that because the trial court based its award on five years of defendant's earnings, it arguably took into account any doubts it had about defendant's drop in income in 2003. Indeed, defendant testified that he earned more money in 2001 and 2002 than at any other time in his life. By also including that income in its calculation, the trial court decided on a fair and equitable award under the facts of the case.[3]

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[3] To the extent defendant contends that the trial court erred when it considered two of the spousal support factors, the present situation of the parties and principles of equity, we will not decide these claims because defendant did not raise these arguments in his direct appeal.

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

/s/ Donald S. Owens
/s/ Henry William Saad
/s/ Karen M. Fort Hood