

STATE OF MICHIGAN
COURT OF APPEALS

CHRYSLA PATRICIA RENUSCH,

Plaintiff-Appellee,

v

RAY B. RENUSCH,

Defendant-Appellant.

UNPUBLISHED

April 10, 2008

No. 275669

Wayne Circuit Court

Family Division

LC No. 06-619662-DO

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

PER CURIAM.

The parties to this case were married in 1991. Defendant was incarcerated in 1995 on an 8 to 20 year term of imprisonment, and is not due for release until at least 2011. Plaintiff filed for divorce from defendant on August 12, 2006. The marital estate consists of a house (which was awarded to plaintiff) and a collection of artwork (which was awarded to defendant). Defendant appeals as of right the judgment of divorce, arguing that the trial court's distribution of property was inequitable, and that he was improperly denied access to the court and the right to counsel. We affirm.

Defendant first argues that the trial court erred by failing to follow certain procedures, provided by MCR 2.004(E), before allowing him to participate in the proceeding by telephone. We disagree. This issue is unpreserved and reviewed for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). By its own terms, MCR 2.004 only applies to domestic relations actions involving minor children or "other actions involving the custody, guardianship, neglect, or foster-care placement of minor children, or the termination of parental rights." MCR 2.004(A)(1)-(2). The parties' marriage did not produce any children; therefore, this rule does not apply to defendant.

Defendant next argues that the trial court erred when it failed to enter an order that would have required plaintiff to pay his attorney fees. We disagree. We review a trial court's decision whether to award attorney fees for an abuse of discretion. *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007).

In a divorce action, one party may be forced to pay the other party's reasonable attorney fees in order to enable the other party to defend or prosecute the action. MCL 552.13; *Borowsky*, *supra* at 687. MCR 3.206(C) provides:

(1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, and that the other party is able to pay . . .

The party requesting the fees *has the burden of showing* need and *that the fees* were reasonable and *in fact incurred*. *Borowsky, supra* at 687; *Reed, supra* at 165. Attorney fees should only be awarded if necessary to allow a party to defend or prosecute an action. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). Here, defendant adequately defended himself in this relatively simple divorce proceeding involving the division of two marital assets (a house and an artwork collection). The trial court took testimony from defendant on each of the issues, allowed defendant to question plaintiff about her testimony, and then subsequently made a decision on the record. In light of these facts, defendant failed to establish the need for an attorney (or that plaintiff was able to pay), as he was not prevented from proving his side of the case. Accordingly, we conclude that the trial court did not err when it failed to enter an order that would have required plaintiff to pay for an attorney to represent defendant. *Borowsky, supra* at 687; *Stackhouse, supra* at 445..

Defendant next argues that the trial court erred when it failed to waive his filing fees and costs based on his indigent status pursuant to MCR 2.002. Once again, we disagree. We review a trial court's decision regarding whether to waive fees and costs for an abuse of discretion. *Lewis v Corrections Dep't*, 232 Mich App 575, 580; 591 NW2d 379 (1998).

MCR 2.002(E)(1) provides:

In an action for divorce, separate maintenance, or annulment or affirmation of marriage, the court shall order suspension of payment of fees and costs required to be paid by a party and order that they be paid by the spouse, if that party

(a) is qualified for a waiver or suspension of fees and costs under subrule (C) or (D), and

(b) is entitled to an order requiring the spouse to pay attorney fees.

MCR 2.002(C) and (D) state that parties receiving public assistance or who are otherwise indigent are entitled to a waiver of fees and costs. The party is required to establish his qualifying status "by ex parte affidavit or otherwise." MCR 2.002(C)-(D). Here, the trial court did not doubt that defendant was indigent. However, defendant has not shown how the lack of an order waiving filing fees made any difference in the case. The trial court heard and decided defendant's motion for summary disposition, and ruled on all issues presented at trial. And, as previously discussed, defendant was not entitled to an order requiring that plaintiff pay for an attorney for defendant. Accordingly, the trial court did not abuse its discretion.

Defendant next argues that his right to due process was violated because he was denied an attorney and made to represent himself over the telephone. We disagree.

There is no constitutional right to counsel in a divorce action. *Haller v Haller*, 168 Mich App 198, 199; 423 NW2d 617 (1988). In *Hall v Hall*, 128 Mich App 757, 761-762; 341 NW2d 206 (1983), cited by defendant, a panel of this Court held that it was generally in the trial court's discretion to make a determination regarding whether an incarcerated litigant be allowed to personally attend a divorce proceeding, and when making such determination should consider:

[W]hether the prisoner's presence will substantially further the resolution of the case, the security risks presented by the prisoner's presence, the expense of the prisoner's transportation and safekeeping, and whether the suit can be stayed until the prisoner is released without prejudice to the cause asserted. [*Id.* at 762 (internal quotation omitted).]

The trial court did not directly address whether defendant's presence would be a security risk or the expense associated with allowing his presence. The court did, however, establish that defendant would be incarcerated for at least another five years. In the court's estimation, this was too long to delay a relatively simple divorce proceeding. Most relevant, the need for defendant's presence was significantly diminished by the court's willingness and ability to allow defendant to participate in the proceeding by telephone. Defendant was able to hear and respond to all parts of the proceeding. In total, the court did not abuse its discretion by conducting this proceeding by telephone because defendant was not hindered in his ability to participate in the proceeding. See *Hall, supra* at 763-764.

Defendant's final argument is that the trial court's award of the house to plaintiff was inequitable.¹ We disagree.² On review, this Court must decide if the trial court's dispositional ruling was fair and equitable in light of the trial court's findings of facts. *Quade v Quade*, 238 Mich App 222, 224; 604 NW2d 778 (1999). The trial court's ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that it was inequitable. *Id.*

When determining an equitable division of property, a court should consider in its distribution the duration of the marriage, the contribution of each party to the marital estate, each

¹ We note that there is no dispute regarding the trial court's distribution of the art collection to defendant.

² We reject defendant's argument that his oral agreement with plaintiff when he entered prison, that plaintiff would move in with her sister and lease the property in question in order to pay the mortgage, constituted a postnuptial agreement that governs the division of their property. A postnuptial property agreement is a contract between spouses to determine the division of property in contemplation of termination of the marriage. *Lentz v Lentz*, 271 Mich App 465, 473-474; 721 NW2d 861 (2006). The aforementioned agreement does not purport to divide the parties' marital property in contemplation of divorce, and accordingly, is not a postnuptial property agreement. *Id.*

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 circumstances. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996). In considering these factors, the trial court should make specific findings on the record. *McNamara v Horner*, 249 Mich App 177, 186; 642 NW2d 385 (2002).

In the instant case, the trial court gave the house, which it determined was valued at \$189,000,³ with an outstanding mortgage debt of \$13,000, to plaintiff. The trial court found that plaintiff contributed \$60,000 to the original purchase of the house (defendant even admitted that plaintiff contributed at least \$50,000) and, since defendant's incarceration in 1995, has been the only contributor to the marital estate, including repayment of loans taken out for the purpose of paying defendant's legal fees, mortgages, and paying maintenance fees on the house. The court also noted that it was defendant's incarceration that has in part diminished the value of the marital estate – by virtue of his legal fees as well as his lack of earning capacity to contribute to the house. The trial court concluded:

The [c]ourt believes under all the equities in which the marital estate was substantially reduced by the occurrence of defendant's criminal conviction, the substantial attorney fees that were incurred, her contribution toward attorney fees, her contribution which by the way, defendant does agree that there was some \$60,000 contributed by the plaintiff to the home, that it is fair and equitable since she's paying for it since 1995, has maintained it since 1995 without assistance from anyone, has paid a big portion of the attorney fees for the defendant – he's in fact, received his share of the marital estate by virtue of all the payments she made for his legal fees. The house is awarded free and clear to the plaintiff on a basis of equity.

Thus, the court clearly articulated, on the record, its consideration of the factors for equitable distribution of property. *McDougal*, *supra* at 89. Given that plaintiff was the main contributor to the marital estate (making a \$60,000 down payment on the house and maintaining all mortgage payments on her own while defendant was in prison), and that defendant's past misconduct led to large legal fees that greatly decreased the value of the marital estate, we are not left with a firm conviction that the trial court's dispositional ruling was inequitable.

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Mark J. Cavanagh

³ We note that defendant has stated that the house subsequently sold for \$155,300 after trial.