

STATE OF MICHIGAN
COURT OF APPEALS

BECKY J. ZELLMER,

Plaintiff-Appellee,

v

ROBERT MICHAEL ZELLMER,

Defendant-Appellant,

and

JAMES M. KINNEY,

Appellee.

UNPUBLISHED

September 15, 2022

No. 357347

Barry Circuit Court

LC No. 2018-000891-DM

Before: MURRAY, P.J., and O'BRIEN and REDFORD, JJ.

PER CURIAM.

In this divorce action, defendant appeals as of right the trial court's order denying defendant's objections to appellee James M. Kinney's receiver fees and expenses, and directing defendant to pay those costs. We affirm.

I. FACTS

Defendant is a farmer. He has owned and operated an 80-acre beef cattle farm with over 150 cattle for over 21 years in Nashville, Michigan. He and plaintiff were married and share four children. In 2018, after 18 years of marriage, they separated and later divorced.

During the divorce proceedings, appellee was appointed receiver of defendant's property—including his real and personal farm property and livestock—after defendant failed to comply with court orders obligating him to remove plaintiff's name from certain indebtedness underlying the property he received in the divorce. The receivership order authorized appellee to take possession and full control of defendant's property, to take any action he deemed reasonable and appropriate to operate the farm, and to manage, maintain, preserve, and attempt to sell the property. The order set appellee's compensation at \$200 per hour.

To carry out his responsibilities, appellee hired a farmhand at \$15 per hour to feed and water defendant's cattle. Appellee personally assisted with some of this farm work, and charged his receiver's rate of \$200 per hour to do so. During the course of the receivership, appellee was seemingly preparing to sell some of defendant's cattle, but defendant objected, and plaintiff and defendant thereafter agreed to prohibit appellee from selling the receivership property for 90 days. Along with this agreement, plaintiff and defendant stipulated to an order requiring defendant "to pay the Receiver's fees [and] the fees and costs associated with maintaining the Receiver Property, which includes but is not limited to fees related to physically maintaining the livestock and feed." Following this order, however, defendant was uncooperative in most respects in that he interfered with appellee's management of the farm property, failed to provide appellee with relevant information when asked, and did not provide appellee with funds to maintain the farm animals. This led to appellee personally taking on more farm work, including purchasing feed and physically feeding the animals, for which appellee charged his receiver's rate.

After termination of the receivership, appellee filed an application for compensation, asking the trial court to approve his receiver's fees and expenses, and to direct defendant to pay those amounts. Defendant objected to appellee's charges for personally carrying out farm work at his receiver's rate of \$200 per hour as excessive and unnecessary on the ground that the market rate for such farm labor was only \$15 per hour. Defendant asserted that appellee ran up overcharges totaling \$4,000.

After conducting an evidentiary hearing, the trial court denied defendant's objections and directed him to pay appellee the requested amounts. The court found that appellee's fees for farm labor were justified given the difficult situation he faced—the parties had agreed to suspend appellee's authority to sell the receivership property and defendant refused to provide appellee with his requested funds or other assistance, which, together, left appellee without any funds to manage the receivership. The court concluded that appellee could not be expected to hire someone to do the farm work without pay, so it was reasonable for appellee to resort to doing much of the farm work himself.

This appeal followed.

II. STANDARD OF REVIEW

"The amount of compensation to be awarded to the receiver is within the trial court's discretion" and, thus, is reviewed for an abuse of discretion. *Band v Livonia Assoc*, 176 Mich App 95, 111; 439 NW2d 285 (1989). See also *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 275; 761 NW2d 761 (2008). "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes." *Id.* "Findings of fact may not be set aside unless clearly erroneous." *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002).

III. DISCUSSION

Defendant argues that appellee's receiver's rate of \$200 per hour to carry out basic farm chores was, if necessary at all, excessive, unreasonable, and unjustifiable in light of the \$15 hourly

market rate for farm labor, and that the trial court abused its discretion in approving the fees. We disagree.

“A receiver is sometimes said to be the arm of the court, appointed to receive and preserve the property of the parties to litigation and in some cases to control and manage it for the persons or party who may be ultimately entitled thereto.” *Westgate v Westgate*, 294 Mich 88, 91; 292 NW 569 (1940). A receiver “derives his authority as . . . receiver from the statutes and rules of court, the order appointing him, and specific orders which may from time to time be made by the court of his appointment.” *Woodliff v Frechette*, 254 Mich 328, 329; 236 NW 799 (1931).

A receiver is entitled to reasonable compensation for services to the receivership estate and attendant expenses. See *Ypsilanti Charter Twp*, 281 Mich App at 280-281; *Band*, 176 Mich App at 111; MCR 2.622(F). A receiver’s fee, however, must not be excessive. See *Ypsilanti Charter Twp*, 281 Mich App at 280-281; *Fisk v Fisk*, 333 Mich 513, 517-518; 53 NW2d 356 (1952). The reasonableness of a receiver’s fees is evaluated in light of the actions the receiver was required to take in order to protect the property. *Cohen v Cohen*, 125 Mich App 206, 215; 335 NW2d 661 (1983). “[A] receiver must show that the expense was a reasonable one . . . , that the amount paid is fair and reasonable, and that it has been actually paid in good faith.” *Ypsilanti Charter Twp*, 281 Mich App at 279 (alteration in original), quoting *Corell v Reliance Corp*, 295 Mich 45, 52-53; 294 NW 92 (1940). “Only those expenses properly, reasonably, and necessarily incurred” to further the directives of the receivership may be charged. *Ypsilanti Charter Twp*, 281 Mich App at 279-280. “The circuit court’s determination concerning the propriety and reasonableness of a receiver’s expenses is treated as presumptively correct because the circuit court has far better means of knowing what is just and reasonable than an appellate court can have.” *Id.* at 275 (quotation marks and citation omitted).

Defendant first argues that his farm chickens and dog were not assets of his cattle farm, and, thus, it was not necessary for appellee to care for them to maintain the receivership. This argument misunderstands the extent of the receivership. The order creating the receivership directed appellee to take possession and control of defendant’s “personal property of every kind or nature,” as well as “all livestock of every kind or nature.” The farm’s chickens plainly fell under this order, as did the pet dog, which, if nothing else, was personal property. See *Koester v VCA Animal Hosp*, 244 Mich App 173, 176; 624 NW2d 209 (2000) (“Pets have long been considered personal property in Michigan jurisprudence.”). Appellee was tasked with taking reasonable and appropriate action to manage and preserve the receivership property—which plainly encompassed the labor and cost of feeding the receivership property,¹ such as the chickens and dog—and the receiver was to be compensated for that work.

Defendant next argues that appellee’s fees for assisting with the farm labor, particularly procuring feed and feeding the chickens, were not justified. Under normal circumstances, charging a receiver’s professional rate—in this case, \$200 per hour—for farm labor would likely be

¹ This is further evidenced by the stipulated order requiring defendant to pay the “fees and costs associated with maintaining the Receiver Property, which includes but is not limited to fees related to physically maintaining the livestock and feed.”

excessive, especially considering that, here, appellee was able to hire a farm laborer to feed and water the cattle for \$15 per hour. Appellee, however, was not facing normal circumstances. The record amply supports the trial court's findings that defendant was uncooperative in most respects during the receivership and, significantly, did not provide funds for labor or supplies to maintain his farm animals, despite appellee's requests. As the trial court found, defendant's bad-faith conduct, coupled with the parties' agreement to suspend appellee's authority to sell receivership property, left appellee's hands tied. Appellee needed additional work done around the farm in order to carry out his responsibilities as receiver, but could not hire additional help without money to pay for it, nor ask the already-hired farm laborer to do more work when the laborer had not even been paid for the work he had already done. Likewise, appellee needed feed for the animals, but could not send the already-hired farm laborer to the market to procure feed without funds to pay for the feed or the labor involved. The record therefore supports the trial court's finding that it was necessary for appellee carry out farm work himself in order to maintain defendant's farm. While appellee's professional receiver's rate of \$200 per hour greatly exceeded the market rate for farm labor, that was the rate stipulated to by the parties when appellee was appointed, and the rate was not itself unreasonable. It was fair and just that appellee be compensated for his time discharging his receivership responsibilities, which, under the unique circumstances of this case, included farm labor.

Moreover, the record suggests that appellee reasonably believed that the arrangement was satisfactory to defendant. Defendant knew or should have known that appellee was physically doing—and charging his professional receiver's rate for—farm work because appellee's interim invoice contained detailed charges for similar work at his receiver's rate, and defendant did not object to or otherwise question those charges.² Further, defendant knew or should have known that he had a continuing obligation to pay “the Receiver's fees [and] the fees and costs associated with maintaining the Receiver Property,” as this was required by the parties' stipulated order. It follows that defendant knew or should have known that he would be responsible for paying appellee's professional receiver's rate for appellee's having to do physical farm work, particularly while appellee's ability to sell defendant's cattle for funds was suspended, which, again, left appellee without any way to obtain funds to maintain the farm.

In short, given the lack of any operating funds from defendant or sales of receivership property, the trial court did not err in finding that appellee did not violate his fiduciary duties by charging his professional receiver's rate for assisting with the farm work himself. While defendant

² Defendant argued before the trial court that, despite the receivership order's 10-day objection period, he was not given an opportunity to object to the fees in appellee's interim invoice because the court granted them at a hearing shortly after they were requested. The trial court found, however, that defendant did, in fact, have time to object to those fees, and otherwise could have moved for reconsideration. Moreover, the court did not enter the written order directing defendant to pay the interim receiver's fees until well over 10 days after the hearing at which the court said it would grant the requested fees. “[A] court speaks through its written orders and judgments, not through its oral pronouncements.” *Tomasik v Michigan*, 327 Mich App 660, 678; 935 NW2d 369 (2019) (quotation marks and citation omitted).

asserts that appellee's time to procure feed and to feed the chickens did not provide a benefit to the cattle farm corresponding to the amount charged for that work, appellee was acting out of necessity, and was entitled to reasonable compensation "for services rendered to the receivership estate." MCR 2.622(F)(1). In light of the difficult circumstances appellee faced, coupled with the trial court's superior ability to assess the situation, we conclude that it was not outside the range reasonable and principled outcomes for the trial court to deny defendant's objections to the receiver's fees and order defendant to pay the fees, including charges at the receiver's rate for the time appellee expended doing farm work.

Defendant next asserts that the trial court erred by failing to consider whether defendant actually had available funds to provide to appellee for operation and maintenance of the farm.³ The record does not contain any suggestion that defendant did not have funds to offer appellee, nor does it indicate that defendant ever complained of a lack of funds to maintain his farm, despite having many opportunities to do so. In fact, defendant stipulated to the most recent order suspending appellee's prerogative to sell receivership property while imposing a continuing obligation on defendant to pay receiver's fees and cover the costs of maintaining the farm and livestock. Further, at the hearing on his objections to appellee's fees, defendant offered no testimony about an inability on his part to provide funds to maintain his farm. Although the record may not reflect the complete picture regarding defendant's financial situation, it reveals that he had significant assets, including the farm realty, personal property, and retirement accounts. On this record, we find no error in the trial court's declining to consider that factor in determining the reasonableness of appellee's fees.

Defendant also argues that the trial court erred by failing to consider that appellee did not attempt to mitigate his financial burdens by requesting a contribution from plaintiff. As stated, a receiver "derives his authority as such receiver from the statutes and rules of court, the order appointing him, and *specific orders which may from time to time be made by the court of his appointment.*" *Woodliff*, 254 Mich at 329 (emphasis added). Here, the receivership order required that the receiver's fees and expenses be paid out of the receivership estate. While the original order also provided that, in the event the receivership lacked funds, "the Plaintiff will advance funds," the subsequent stipulated order squarely placed the obligation for the costs of maintaining the farm with defendant. It stated that defendant "shall have the continuing obligation to pay the Receiver's fees [and] the fees and costs associated with maintaining the Receiver Property, which includes but is not limited to fees related to physically maintaining the livestock and feed."⁴ As discussed, the record did not contain any evidence suggesting that defendant did not have funds available to maintain his farm; rather, the evidence showed that defendant simply refused to

³ Defendant never asserted before the trial court that he did not have funds available, so this issue is unpreserved. See *Glasker-Davis v Auvenshine*, 333 Mich App 222, 227-228; 964 NW2d 809 (2020) (explaining that a party must raise an issue before the trial court to preserve it for appellate review).

⁴ The stipulated order also stated that "all prior Order[s] and Judgments, not in conflict herewith, shall remain in full force and effect."

provide such funds. Accordingly, contrary to defendant's argument, appellee had no obligation to seek contribution from plaintiff.

Defendant lastly asserts that appellee should have asked the trial court to allow him to sell cattle in order to address the shortfall in operational funds and mitigate his fees. Defendant correctly notes that the receivership order initially gave appellee the authority to sell receivership property subject to the circuit court's approval. Appellee explained below that, under normal circumstances, he would have sold some of the cattle to obtain operating funds, and the record shows that appellee took steps to do just that by (1) attempting to secure an inventory of the cattle from defendant and (2) obtaining a court order directing defendant to provide that inventory. Defendant, however, objected to the sale of his cattle. This presumably led to the parties' agreement prohibiting appellee from selling the receivership property for 90 days, while defendant agreed to a continuing obligation to pay the receiver's fees and costs associated with maintaining the property. The resulting stipulated order suspended appellee's authority to sell property in order to fund the farm's operations. Defendant cannot now claim error for appellee's alleged failure to sell the cattle when he objected to that action below and agreed to a stipulated order prohibiting appellee from selling receivership property. Allowing defendant to claim error for appellee's alleged failure to sell receivership property would be akin to permitting defendant to harbor error as an appellate parachute, which we refuse to do. See *Polkton Charter Tp v Pellegrom*, 265 Mich App 88, 96; 693 NW2d 170 (2005) (explaining that a party may not assign as error on appeal something that they deemed proper in the lower court because allowing them to do so would permit that party to harbor error as an appellate parachute).

In sum, appellee, as the receiver of defendant's property, had a right to reasonable compensation for his services and expenses. See *Fisk*, 333 Mich App at 517-518; *Ypsilanti Charter Twp*, 281 Mich App at 280-281; *Band*, 176 Mich App at 111. The record clearly reflects that defendant failed to cooperate with the receivership or to provide funding for which he was responsible, which justified appellee's doing physical farm work for which he charged his established rate of compensation. Although appellee's efforts to mitigate his fees and expenses would also factor into the reasonableness of his charges, we conclude that, given the difficult situation appellee faced as a result of the stipulated order prohibiting appellee from selling defendant's property and defendant's refusal to supply appellee with his requested funds, the trial court's denial of defendant's objections to appellee's receiver's fees was not outside the range of reasonable and principled outcomes.

Affirmed.

/s/ Christopher M. Murray
/s/ Colleen A. O'Brien
/s/ James Robert Redford