STATE OF MICHIGAN

COURT OF APPEALS

IRENE E. RUBIN,

Plaintiff-Appellee/
Cross-Appellant,

v

IRVING A. RUBIN,

Defendant-Appellant/
Cross-Appellee.

UNPUBLISHED
July 16, 1996

No. 155254
LC No. 89-366467-DO

IRENE E. RUBIN,

Plaintiff-Appellee,

v

IRVING A. RUBIN,

Defendant-Appellant.

No. 157172
LC No. 89-366467-DO

IRENE E. RUBIN,

Plaintiff-Appellant,

v

IRVING A. RUBIN,

Defendant-Appellee.

No. 160669
LC No. 89-366467-DO

Before: Markman, P.J., and Marilyn Kelly and L. V. Bucci,* JJ.

*Circuit judge, sitting on the Court of Appeals by assignment.

PER CURIAM.

In these cases, consolidated for appeal, plaintiff and defendant appeal by right property division provisions contained in a divorce judgment and two post-judgment orders. We reverse in part and affirm in part.

Plaintiff and defendant were married in February 1980. This was a second marriage for both parties. Both parties had children from their prior marriage and no children were born of this marriage. At the time of this divorce, plaintiff was aged sixty and defendant was aged seventy-three.

Plaintiff filed the present divorce complaint in March 1989 but a judgment was not entered until August 1992. Substantial assets were involved. The parties both utilized their own accountants and the court appointed an expert as well. The court determined their individual estates at the time of the marriage: plaintiff - $675,000; defendant - $6,446,308. It found the increase in assets during the marriage to be $4,663,463, which it divided equally between the parties. On appeal, the parties raise various claims of error relating to the division of property.

When considering an appeal of an order dividing marital property, this Court first reviews the factual findings for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). If we uphold the factual findings, we then decide whether the trial court's dispositional ruling was fair and equitable in light of the facts. *Id*. at 151-152. We affirm the dispositional ruling unless we are left with the "firm conviction that the division was inequitable." *Id*. at 152.

On appeal, defendant first contends that the trial court improperly valued one of his assets, IMCERA stock, by arbitrarily choosing a valuation date of December 31, 1991, at which time this stock's value stood at a relatively high historical level. He claims that the value of this stock was $2,895,000 in December 1990, soared to $5,009,907 in December 1991 and plummeted to $3,489,560 in April 1992. He argues that the court should have used the time of trial or the time of filing the complaint as the relevant date for valuing assets.

"The actual date to be used for valuation of an asset is within the discretion of the trial court." *Burkey v Burkey (On Rehearing)*, 189 Mich App 72, 76; 471 NW2d 631 (1991). Here, the trial court noted the effect of a valuation date on the valuation of a fluctuating asset as well as specific difficulties experienced here in obtaining valuations from the experts. It determined that December 31, 1991, was the "fairest date to use in regards to this Estate." This was the date the three experts used to value all of the assets. We further note that it was defendant's objection to the court's initial appointed expert that caused, in part, delays in valuing the assets. Therefore, we find no abuse of discretion in the trial court's determination of the valuation date. It is in the nature of stocks to fluctuate in value; in order to demonstrate abuse of discretion by the court, defendant must show something more than that another valuation date would have operated to his financial advantage.

Defendant next argues that his exposure to liability from criminal charges in antitrust litigation pending against him at the time of the divorce should have been deducted from the marital estate. The court considered this potential antitrust liability in valuing the involved asset, Container Products, at zero. But it did not directly subtract this potential liability from the marital estate. We find it appropriate to hold defendant personally responsible for such criminal penalties rather than subtracting them from the marital estate. Thus, we do not find this dispositional ruling inequitable.

Defendant next contends that the trial court erred in ordering defendant to pay a portion of plaintiff's attorney fees. He argues that such fees are to be awarded only to preserve a party's right to litigate. This Court reviews a trial court award of attorney fees in a divorce action for an abuse of discretion. *Ianitelli v Ianitelli*, 199 Mich App 641, 645; 502 NW2d 691 (1993). Generally, attorney fees are appropriate when financial assistance is necessary to enable a party to prosecute or defend an action. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). However, an award of legal fees is also appropriate "where the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation." *Id.* Here, the trial court stated that this matter could have been "quietly resolved early on, had the parties been more realistic in relation to their expectations as well as their responsibilities." The court concluded that defendant was not as cooperative as he represented himself to be and that his actions necessitated a significant portion of plaintiff's attorney fees. Therefore, we find no abuse of discretion in the trial court's order that defendant pay a portion of plaintiff's attorney fees ($73,000).

Defendant next claims that the trial court erred in ordering him to pay all the fees for the first court-appointed expert. Four months after this expert began working on valuing the estate, defendant objected to him on the basis of an alleged conflict of interest. The court removed the expert and substituted in another expert. In ordering defendant to pay the fees of the initial expert, the court stated that it had substituted another expert in order to pacify defendant and to facilitate a settlement of this matter. The court specifically noted that the removal of the first expert was not to be construed as a conclusion that defendant's objections to the expert were valid. Plaintiff and defendant apparently shared the fees of the second court-appointed expert. Because defendant belatedly objected to the first expert, this expert completed four months of work that the parties were unable to use but for which they were charged. Under these circumstances, we find no abuse of discretion in the court's order that defendant pay the fees for the initial court-appointed expert.

Defendant next argues that the trial court erred in ordering him to pay for a country club membership for plaintiff. He contends that this is not equitable and that plaintiff offered no evidence regarding the type of membership sought or cost thereof. Before the marriage, plaintiff had an individual membership with this country club. Under club rules, plaintiff had to surrender her individual membership when, during the marriage, defendant joined the country club. The court awarded defendant the country club membership in the divorce but ordered him to pay the costs if plaintiff decided to seek her own membership. We do not find this dispositional ruling inequitable.

Defendant next claims that the trial court erred in awarding interest to plaintiff on the amount due on the property division provisions of the divorce judgment, in awarding interest at the prime rate and in awarding interest prior to the date the divorce judgment was entered. This Court reviews awards of interest for an abuse of discretion. *Reigle v Reigle*, 189 Mich App 386, 393-394; 474 NW2d 297 (1991). The statute governing interest on money judgments, MCL 600.6013; MSA 27A.6013, is inapplicable to divorce judgments. *Reigle, supra* at 392. Further, because the goal of divorce judgments is to equitably distribute property rather than to compensate a party for loss, an interest award in a divorce action is not intended to compensate for lost use of funds. *Id*. at 394. However, in its discretion, a court may award interest on amounts to be paid pursuant to a property division when such amounts are overdue. *Id*. Such awards of interest encourage prompt compliance with court orders and avoid a windfall to the delinquent party who derives interest on this money during the period when it is due to be paid but is not. *Id*.; *Ashbrenner v Ashbrenner*, 156 Mich App 373, 377; 401 NW2d 373 (1986).

Here, the divorce judgment ordered defendant to pay sums to plaintiff. Defendant failed to timely do so. The trial court then awarded interest on this unpaid sum to plaintiff at the prime rate starting on June 5, 1992, the date it issued its opinion even though the divorce judgment was not entered until August 3, 1992. Because amounts awarded to plaintiff in the judgment were overdue,[1] an award of interest to plaintiff prevented defendant from receiving a windfall from delaying in paying the amounts due. We do not find the award of interest to her inequitable.

However, the starting date for interest and the interest rate were inappropriate. Amounts awarded to plaintiff under the judgment were not due until the judgment was entered; accordingly, the court erred in awarding interest starting before the August 3, 1992, entry date.

The usury statute, MCL 438.31; MSA 19.15(1), applies to debts from one spouse to another pursuant to a divorce judgment. *Norman v Norman*, 201 Mich App 182, 189; 506 NW2d 254 (1993); *Clifford v Clifford*, 434 Mich 480; 453 NW2d 675 (1990). We note that these decisions involved interest rates provided for in consent judgments of divorce. Here, the issue is postjudgment interest awarded by a court for failure to timely pay amounts awarded in a divorce judgment. Whatever the continuing merits of the usury statute in general, we find no reason to distinguish between its applicability to a consent judgment of divorce and to court-ordered postjudgment interest on a divorce judgment. Because the interest at issue was awarded by the court and not stipulated to in writing by both parties, the usury statute limits the rate to five percent. MCL 438.31; MSA 19.15(1). Therefore, we reverse the trial court's September 28, 1992, order granting interest to plaintiff and remand this matter to the trial court for correction of the order. Specifically, we instruct the trial court to correct the date interest began accruing to August 3, 1992, (the date the divorce judgment was entered) and to limit the interest rate to five percent pursuant to the usury statute.

On cross appeal, plaintiff contends that the trial court erred in reducing the marital estate, as opposed to defendant's pre-marital estate, by the amount of $1,250,000 for potential environmental liability (including attorney fees) of one of his companies, Great Lakes Container Company. The trial

court found Great Lakes Container Company, acquired by defendant before the marriage, to be a pre-marital asset. But it assessed potential environmental liability against the marital estate. This potential environmental liability arises under the Michigan Environmental Response Act, MCL 299.601 *et seq*.; MSA 13.32(1) *et seq*., which did not come into effect until after the parties were married. However, under this act, defendant may be found liable for environmental damage that occurred prior to the marriage as well as for damage that occurred during the marriage. Defendant argues that even if he is found liable for activity that occurred prior to the marriage, the cause of action did not accrue until after the act was enacted and, therefore, after the marriage. Moreover, he contends that both parties benefitted from income generated by this company during the course of the marriage making it appropriate for them to share in concomitant liabilities. We agree with his latter argument and further note that income generated by this company during the marriage was partly-- perhaps significantly-- a function of defendant's work and investment prior to the marriage. In this context, we do not find inequitable the court's dispositional ruling that the potential environmental liability against this company-- also perhaps incurred prior to the marriage-- be deducted from the marital estate. Plaintiff cannot claim the fruits of defendant's efforts in building up Great Lakes prior to their marriage without also being prepared to shoulder the attendant costs.

Plaintiff also argues that the trial court erred in valuing Container Products Company at zero. Plaintiff contends that her expert valued it at $2.5 million and that the court-appointed expert valued it at $700,000. However, defendant's expert valued it at zero. The court-appointed expert expressed uncertainty regarding his valuation of this asset. The trial court stated that the court-appointed expert only assessed any value to it because it was a going concern from which defendant drew a salary. The court found the assessment speculative and concluded that any salary drawn by defendant would be income earned as opposed to a business asset per se. In valuing this company, the court also factored in defendant's criminal liability arising out of federal antitrust litigation. In the context of this evidence, we do not find the trial court's valuation of Container Products Company clearly erroneous.

The final two issues raised by plaintiff relate to defendant's transfer of IMCERA stock to plaintiff to satisfy his obligations to plaintiff. These issues were resolved by the trial court during the pendency of this appeal and are therefore now moot.

For these reasons, we reverse the September 28, 1992, order granting plaintiff's request for interest on proceeds due pursuant to the judgment of divorce and remand this matter for correction of the interest award in conformity with this opinion. In all other respects, we affirm the judgment of divorce.

/s/Stephen J. Markman
/s/Lido V. Bucci

[1] The present case is distinguishable from *Reigle*, in which the plaintiff voluntarily agreed to stay proceedings and waive her right to enforce the property settlement during the pendency of the appeal. *Reigle, supra* at 395. In the absence of such a stipulation, we believe that it would upset the equitable distribution of property ordered by the trial court to allow defendant to delay payment of sums due under the divorce judgment until after appeal without incurring interest.