STATE OF MICHIGAN

COURT OF APPEALS

JAMES ALDEN HAINES,

Plaintiff-Appellee/Cross-Appellant,

v

KELLY JO HAINES,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
December 15, 2009

No. 285932
Tuscola Circuit Court
LC No. 06-023380-DM

Before: Talbot, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

The parties appeal as of right a judgment of divorce. We affirm in part, reverse in part, and remand.

The facts in this case, and most of the provisions of the parties' divorce, are uncontested, and the record shows that they were commendably cooperative with each other during these proceedings. The parties had been married for almost twenty years, and they both spent much of their lives working for plaintiff's family grocery business in one capacity or another. The only serious issues below and on appeal are an attorney fee award to defendant and whether two entities – a trust and an LLC – were marital assets or plaintiff's separate assets.

In divorce cases, the trial court's findings of fact are reviewed for clear error, and the trial court's dispositional rulings are reviewed for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005). This Court does not reverse dispositional rulings unless firmly convinced that it was inequitable in light of the facts. *Id*. The trial court's first task is to determine what assets are marital and what assets are separate. *Id*. Marital assets need not be divided mathematically equally, "but the trial court must clearly explain divergence from congruence." *Id*. at 152. Separate assets may be invaded and distributed only if the other spouse contributed to those assets in some way, or if the other spouse's distribution is insufficient for his or her suitable support and maintenance. *Id*.

This Court reviews a trial court's ultimate award of attorney fees for an abuse of discretion, but any underlying factual findings are reviewed for clear error, and any underlying questions of law are reviewed de novo. *Reed*, *supra* at 164. "Either by statute or court rule, attorney fees in a divorce action may be awarded only when a party needs financial assistance to prosecute or defend the suit." *Id*. While attorney fees may only be awarded to the extent a party

requires them to participate in an action, "[i]t is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003).

Plaintiff's father was the owner of the business for which the parties worked as employees. Both started out in low-level roles at a store in Caro, and they transferred to another store in Vassar, where defendant performed office duties and plaintiff became manager. Plaintiff's father created the LLC as a holding company for the proceeds of his decision to sell the Caro store, in which plaintiff had had a 27 percent interest – apparently unbeknownst to him at the time. Plaintiff's father converted plaintiff's ownership interest in the Caro store into a minority ownership interest in the LLC. The LLC was an S-corporation and thus passed profits or losses on to the shareholders personally, and it made one distribution to the parties – who filed taxes jointly – to cover a capital gains liability. The LLC held a variety of stocks.

Plaintiff's father also created a trust that he gifted to plaintiff, which he testified was for "estate planning and too much too soon destroys the work ethic . . . I just didn't want to give him that kind of money." The trust's sole asset was a minority interest in the Vassar store and it never made any distributions. Although the trust was irrevocable, it would be transferred to plaintiff when plaintiff reached the age of 55, and in the meantime, plaintiff had absolutely no rights or privileges therein. Plaintiff's father testified that plaintiff did not even know about the trust when the trust was created. Both the LLC and the trust were in plaintiff's name only. The parties' experts generally agreed on the present values of plaintiff's interests in the trust and LLC, but the evidence showed that it was not possible to predict what – if anything – the trust would be worth by the time plaintiff reached the age of 55.

The trial court found neither the trust nor the LLC to be marital property, but it decided – apparently *sua sponte* – to exercise its equitable powers to invade the LLC in the amount of $250,000 based on defendant's needs. The trial court's thorough opinion recounted the fact that the parties had lived a comfortable lifestyle while married. They earned, on average, a total of approximately $175,000 a year and receiving a number of gifts, financial and otherwise, from plaintiff's parents. However, after the divorce, defendant's income would be approximately $59,000, including both imputed income and child support, while plaintiff's would be in excess of $100,000 after deduction of spousal and child support. Furthermore, defendant returned to school to make herself employable, and she would be required to obtain her own health insurance. The trial court recognized that it could not "equalize" anything from plaintiff's parents, but it found invasion of plaintiff's LLC equitable and necessary. The trial court deducted from that invasion $75,000 as credit for money plaintiff advanced to defendant for her support during the proceedings, which the parties had agreed would be credited against the ultimate property distribution.

After trial and a post-trial hearing, the trial court also determined that it was necessary to award attorney fees to defendant. Defendant had incurred undisputed attorney fees of approximately $71,000, and she requested $55,000. The trial court concluded that defendant had had some ability to pay her attorney fees, on the basis of excess income and, apparently, the $75,000 advance, so it awarded attorney fees in the amount of $20,000. The trial court further found that plaintiff was currently carrying significant debt due to loans he had obtained to, among other things, pay defendant for her share of the marital residence. Because it found that plaintiff would not "be able to keep his head above water" if the court ordered a large lump

payment, it ordered payment by a transfer of money from plaintiff's 401(k) account to defendant's 401(k) account.

Defendant argues first that the LLC should have been considered a marital asset, either because plaintiff's interest was intended to belong to both parties notwithstanding being titled in plaintiff's name alone, or because her efforts contributed to the asset's appreciation. We disagree. Most of the appreciation is due to plaintiff's father's control of its investments, and defendant's status at the Caro store was that of being one employee out of almost a hundred. The trial court found plaintiff's father credible in stating that the only reason for making the transfers to plaintiff was for estate planning purposes. Although plaintiff's father clearly intended for plaintiff's entire family to lead a comfortable lifestyle and for plaintiff eventually to take over the family business, at no time did he testify that he intended the LLC to be owned by both parties. In short, while the evidence is not overwhelming, we are not "left with the definite and firm conviction that a mistake has been made." *Reed*, *supra* at 150.

Defendant also argues that the trust should have been considered a marital asset, for essentially identical reasons. We again disagree. The trial court found that plaintiff simply did not have any "true" interest in the trust, because he would only theoretically receive any control of or benefit in the trust in twelve years, by which time the trust might not even be worth anything. The undisputed evidence was indeed that it was not even possible to predict what, if anything, the trust would be worth when plaintiff finally received any functional rights thereto.

Future assets can be included in the marital estate and distributed, even if they will not be received until some time after the divorce is finalized. *McNamara v Horner* (*After Remand*), 255 Mich App 667, 670; 662 NW2d 436 (2003). Even unvested or contingent interests in pension, annuity, or retirement benefits may be considered part of the marital estate where equity so requires. MCL 552.18(2); *Baker v Baker*, 268 Mich App 578, 582; 710 NW2d 555 (2005). However, the trust is not a pension, annuity, or retirement benefit. Otherwise, the party seeking to include an asset in the marital estate "bears the burden of proving a reasonably ascertainable value." *Wiand v Wiand*, 178 Mich App 137, 149; 443 NW2d 464 (1989). The trust is not excluded from the marital estate simply by virtue of being presently of no functional value until a future contingency. However, unless it is a pension, annuity, or retirement benefit, the trust *is* excluded from the marital estate if whatever value plaintiff will receive cannot be reasonably ascertained. The trial court properly excluded the trust from the marital estate on that basis.

Defendant next argues that the trial court should have invaded the LLC by a larger amount, and on cross-appeal, plaintiff argues that the trial court should not have invaded the LLC at all. We disagree with both parties.

Plaintiff argues that defendant did not demonstrate a need for the LLC to be invaded. But a "demonstration of additional need" is made if "a division of the marital assets alone would [be] insufficient for suitable support in the manner to which the [parties] were accustomed." *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). Here the parties previously shared an income of $175,000 and a number of other benefits derived from plaintiff's parents or the

corporation. After the divorce, defendant's income will be $59,000, a sum that includes child support and imputed income,[1] and she no longer has access to the other resources the parties had shared. The trial court recognized that it would be impossible to *completely* equalize the parties' post-divorce lives, because much of their "lavish" lifestyle had simply been funded outright by plaintiff's parents, something that obviously could not be distributed. But it also found that plaintiff would be able to continue leading a comfortable life, while defendant would lead a much more spartan lifestyle. The trial court did not err in finding that defendant demonstrated additional need.

Defendant contends that the trial court erred in not distributing *enough* of the LLC. It does seem readily apparent that the trial court's invasion of the LLC was a small portion of the total value of plaintiff's asset, and it is also readily apparent that the invasion does not actually equalize the parties' income. However, defendant does not make any argument purporting to state what *would* be an equitable distribution. The trial court structured the invasion as $250,000, reduced by a prior stipulated advance by plaintiff of $75,000, to be paid at a rate of $1,000 a month for approximately the next 14½ years. The result is that defendant's annual effective income (again including child support and imputed income) would be increased to $71,000, which is approximately 40% of her half of the parties' pre-divorce income.

Marital estates should be apportioned "to reach an equitable division in light of all the circumstances," which means that the portions need not be exactly equal, but there must be some clearly explained reason for any significant inequalities. *Welling v Welling*, 233 Mich App 708, 710; 592 NW2d 822 (1999). However, apportionment of *separate* assets in a divorce is not intended to achieve equality *per se*, but rather is for the purpose of providing for one spouse's remaining needs, "as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case." MCL 552.23(1); see also *Charlton v Charlton*, 397 Mich 84, 92-94; 243 NW2d 261 (1976). The trial court's division of a separate asset is therefore highly discretionary, and a plain reading of the statute shows that the equities to be considered include more than just one spouse's needs and the other's abilities.

Given the invasion of the LLC, the parties continue to have a significant discrepancy in their annual incomes. But as the trial court observed, complete equality is not necessarily possible here, and the purpose of invading a separate asset is not to achieve equality, but rather to achieve an equitable accommodation of the parties' needs under all of the facts and circumstances of the case. We are simply not able to discern anything from the record or the

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[1] We note that the age of the children shows that child support will continue for only a short period of time. Spousal support was set at $2,301 a month for 7.5 years or until death of either party, until defendant remarries, or until defendant "cohabits without benefit of marriage in an intimate relationship for six months or longer." We note that this last provision appears on its face to be a grossly impermissible and inappropriate dictation of an adult's sex life. But this Court has explained that "cohabitation" is actually a multi-factored factual determination that looks to many factors of a relationship, and it explicitly cannot be founded on sexual intercourse alone. See *Smith v Smith*, 278 Mich App 198, 200-204; 748 NW2d 258 (2008).

parties' arguments from which we could find that amount of the trial court's invasion was an abuse of discretion.

Next, defendant argues that the trial court's award of attorney fees in the form of a transfer between the parties' 401(k) accounts was impermissible. We disagree. Defendant's primary argument is that no case and no statute anywhere has ever approved of this manner of transfer. We conclude that the significant fact is the absence of any case or statute *dis*approving of this manner of transfer. Defendant's argument that she cannot immediately access funds in her 401(k) account without incurring a tax penalty is well-taken, but we agree disagree that it is a "sham award." Her 401(k) account has real value, and as the trial court observed, she has other ways to use the money therein. Significantly, we find no clear error in the trial court's finding that plaintiff simply could not pay the award in any other way.

Finally, defendant argues that the trial court abused its discretion by granting an insufficient attorney fee award. We agree.

"It is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Gates*, *supra* at 438. The trial court found that defendant had *some* ability to pay her attorney fees from excess income. However, the evidence showed that she had to take out a loan and invade a significant portion of the $75,000 advance from plaintiff to pay her attorney fees. The trial court observed that plaintiff had had to use some of his capital to pay his attorney, so "then as a matter of principle [defendant] should also be called upon to invade capital to some extent." While this principle has some appealing symmetry, it overlooks the fact that the $75,000 advance was intended to help support defendant during the pendency of the divorce. Thus, the trial court's award of attorney fees appears to be based on a finding that defendant had to invade assets that she was relying on for support, yet nevertheless requiring her to do so. Furthermore, as discussed, an award by transfer between 401(k) accounts does not give defendant the immediate ability to realize the full amount of transferred money.

We conclude that the trial court should have granted the full amount of attorney fees requested by defendant. We therefore remand this matter to the trial court for entry of an order transferring an additional $35,000 from plaintiff's 401(k) account to defendant's 401(k) account. In all other respects, we affirm. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis