STATE OF MICHIGAN

COURT OF APPEALS

LYNN LOUISE TRUDEAU-CHENE, Plaintiff-Appellee,	UNPUBLISHED October 26, 2006
v	No. 260734 Crawford Circuit Court
WAYNE ROBERT CHENE, Defendant-Appellant.	LC No. 03-005972-DO

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right an order that reaffirmed, but modified in part, a previously issued default judgment of divorce. The initial judgment of divorce was entered as a default judgment because defendant had failed to defend up to that point in the proceedings. Defendant subsequently appeared, and the trial court set aside the default and afforded the parties an evidentiary hearing to determine whether the initial divorce judgment should be modified for equitable reasons and whether the parties' prenuptial agreement was enforceable. Defendant argues in part that the trial court erred by failing to effectuate the parties' prenuptial agreement. We affirm.

Defendant first argues that because the trial court did not expressly reopen this case for discovery when it set aside the default, he was not afforded due process. We disagree. Whether a party has been afforded due process is a constitutional question of law reviewed de novo. *Hanlon v Civil Service Comm*, 253 Mich App 710, 717; 660 NW2d 74 (2002). Here, defendant had nearly a three-month period between the entry of the order setting aside the default and the final evidentiary hearing, giving him ample opportunity to conduct discovery. While the trial court indicated that it was only reopening proofs, there was no mention that the parties were barred from conducting any discovery before the evidentiary hearing.[1] There is no claim that the

[1] The trial court entered an opinion and order that indicated in its title that the court was granting defendant's motion to set aside the default judgment. In the body of the opinion and order, however, the court suggested that it was only setting aside the default and not the divorce judgment, stating that it "would hold an additional hearing to determine whether the property (continued…)

trial court affirmatively denied any attempt at discovery, nor does the record reveal any court filing by defendant pursuant to which he sought court permission to conduct discovery, sought clarification on the matter, or challenged the court's ruling. Although defendant asserts that because the divorce judgment was not set aside he was not entitled to conduct discovery under the court rules, the unusual posture of this case did not clearly bar discovery, there was no request or demand for discovery, and, significantly, defendant had been under the impression up until the time of the evidentiary hearing that the court had set aside the default divorce judgment.[2] Furthermore, analogous to receiving information and documents through the discovery process, defendant did not attempt to subpoena witnesses and documents for the hearing under MCR 2.506(A). Under these circumstances, we cannot conclude that defendant was denied due process of law. See *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 29; 703 NW2d 822 (2005) ("The principle of fundamental fairness is the essence of due process.").

Defendant next argues that he was denied due process because the issues contested at the evidentiary hearing exceeded the scope of the notice of the hearing defendant had received. We disagree. Whether a party was given sufficient notice to satisfy due process is a legal question reviewed de novo. *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 503-504; 536 NW2d 280 (1995). For notice to be constitutionally sufficient, it must be reasonably calculated to apprise interested parties of the pendency of an action and must afford them an opportunity to present objections. *Id.* at 504.

Here, the record reflects that plaintiff filed a notice of hearing with the court and properly served the notice on defendant. While the notice simply indicated that the hearing regarded "Evidentiary on Whether Prenuptial Agreement should be Enforced," the scheduling of the hearing was done shortly after entry of the opinion and order setting aside the default in which the court ordered an additional hearing to be held "to determine whether the property distribution was equitable[.]" The trial court's order clearly encompassed the holding of an evidentiary hearing that went beyond the prenuptial agreement, and it is only reasonable to conclude that defendant was aware that the scheduled evidentiary hearing would touch on all aspects of the case remaining at issue.

Moreover, within the context of determining whether to enforce a prenuptial agreement, a court must consider, in relevant part, whether circumstances have changed since the agreement was executed, rendering its enforcement unfair and unreasonable. *Rinvelt v Rinvelt*, 190 Mich App 372, 380; 475 NW2d 478 (1991). Thus, defendant should have been aware that the parties'

(…continued)

distribution was equitable[.]" An earlier evidentiary hearing had been held relative to entry of the default judgment, in which plaintiff and another witness testified. At the final evidentiary hearing, the trial court stated that it had previously only set aside the default and not the divorce judgment. The court further stated that it was only allowing a reopening of proofs in order to determine whether the default divorce judgment was erroneous or required correction.

[2] Defense counsel informed the trial court that he "thought that the Judgment of Divorce was set aside as well [as the default]." This negates defendant's appellate argument that he thought he could not conduct discovery before the hearing because the default divorce judgment was not set aside.

change in circumstances during the course of their marriage was to be considered during the hearing, which would entail nearly every conceivable type of evidence concerning the parties' marriage, including testimony about the parties' assets, their individual earnings, the parties' health, and any evidence of fault. Under these circumstances, we cannot conclude that defendant was denied due process of law.

Next, defendant argues that plaintiff was not entitled to an award of spousal support because she never pled a claim for such support. We disagree. First, plaintiff did make a general demand in the complaint for any relief deemed equitable and appropriate. Regardless, MCR 2.601(A) allows a trial court to award relief to a party so entitled even if the relief was not specifically requested in the party's pleadings. Furthermore, a specific claim for entry of a spousal support award was encompassed in the default documents filed with the court. See MCR 2.601(B).

Defendant next argues that the trial court essentially failed to give effect to any of the provisions of the parties' prenuptial agreement. Although we conclude that the trial court erred in its interpretation and construction of various provisions contained in the prenuptial agreement, substantial justice does not require reversal because the evidence clearly established that the facts and circumstances had changed since the agreement was executed, rendering its enforcement unfair and unreasonable; any error was harmless. MCR 2.613(A).

Under Michigan law, for a prenuptial agreement to be valid and enforceable, certain standards of fairness must be satisfied. *Rinvelt, supra* at 380, quoting *Brooks v Brooks*, 733 P2d 1044, 1049 (Alas, 1987). A prenuptial agreement should be enforced unless (1) the agreement was obtained through fraud, duress or mistake, or misrepresentation or nondisclosure of material fact; (2) the agreement was unconscionable when executed; or (3) the facts and circumstances have changed since the agreement was executed, rendering its enforcement unfair and unreasonable. *Rinvelt, supra* at 380-381. The party contesting enforcement of a prenuptial agreement bears the burden of proof and persuasion. *Reed v Reed*, 265 Mich App 131, 143; 693 NW2d 825 (2005). In determining whether changed circumstances justify refusing to enforce a prenuptial agreement, the first step is to focus on whether the changed circumstances were reasonably foreseeable prior to or when the parties entered into the agreement. *Id.* at 144. "This approach precludes the judiciary from substituting their [sic] own subjective views of 'fairness' contrary to an express written agreement." *Id.*

At the time the parties executed the prenuptial agreement, plaintiff was employed as a waitress, and had been for years, and defendant was selling business parts. Both parties were earning under $20,000 a year. Subsequently, plaintiff quit her job as a waitress and later started a beauty salon, which, for the most part, is not generating any profit. Defendant, on the other hand, eventually went through an electrical lineman apprenticeship, with plaintiff's financial assistance, and then he worked and continues to work as an electrical lineman. Defendant's income rose significantly over the years and, as of the hearing date, defendant was earning over $100,000 a year.

Additionally, at the time the parties executed the prenuptial agreement, plaintiff had a Putnam account containing $100,000[3] that dwindled down to $3,000 by the time of the divorce. The prenuptial agreement had provided that this account would remain plaintiff's property. Although there was conflicting evidence, it appears that the funds from the account were used to benefit both parties during the marriage.

The house that plaintiff brought into the marriage was never definitively valued, but the evidence suggests that it was minimally worth $84,000 (doubling SEV), and there had existed a mortgage balance of only $19,000 on the home when the parties married. Therefore, there was a significant amount of equity in the home at the time the prenuptial agreement was executed. However, during the marriage, multiple loans or credit lines were taken out and secured by mortgages. Even accepting defendant's position that the balances are in the neighborhood of $55,000, instead of $90,000 as claimed by plaintiff, the equity in the home is significantly lower than it would have been absent the mortgages, leaving plaintiff with a large debt to repay in the future. Again, use of the loan proceeds appears to have benefited both parties during the marriage.

There is no indication in the record that, at the time they entered into the prenuptial agreement, the parties foresaw that plaintiff would start and operate an unprofitable beauty salon and that defendant would become an electrical lineman making over $100,000 a year, nor that it was foreseen that the equity in the home would dwindle away along with the value of plaintiff's Putnam account. The unfairness and unreasonableness of enforcing the prenuptial agreement lies in the fact that it contemplated plaintiff retaining her Putnam account and the home as her sole property upon divorce, but those assets have now been substantially depleted to defendant's benefit, while defendant's entitlement to his entire annuity and pension, which did not decrease in value but rather increased, would remain unscathed under the prenuptial agreement. Further, the prenuptial agreement would appear to preclude any award of spousal support despite the drastic difference in income that did not exist, nor was foreseen, at the time the prenuptial agreement was signed in 1989. Accordingly, although the trial court did not give effect to the prenuptial agreement on the basis of the court's incorrect construction of the contract, the error was harmless because the agreement is unenforceable as the facts and circumstances have changed since the agreement was executed, rendering it unfair and unreasonable. We now turn our attention to defendant's claim, made outside the context of the prenuptial agreement, that the

---

[3] Defendant could not recall ever hearing that plaintiff had $100,000 in an account, but he did recall that she had an account that was considerable, somewhere in the neighborhood of $67,000. On appeal, defendant complains of the lack of documentary evidence regarding the account and its balance and whether the funds were in a Putnam account at the time, but defendant's own testimony recognizes the existence of a large account, and we note that the attached property list to the prenuptial agreement references a Putnam account. The trial court, in a position to judge the parties' credibility, found that plaintiff had a $100,000 account on entering the marriage, and we find no error in this conclusion, especially considering that plaintiff would most likely have had greater knowledge than defendant regarding her assets held in 1989.

trial court did not equitably divide the marital estate and erred in awarding plaintiff $3,000 a month in spousal support.

First, with respect to spousal support, the award of alimony or spousal support is within the discretion of the trial court, and thus it is reviewed for an abuse of discretion. See *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003); *Thames v Thames*, 191 Mich App 299, 307; 477 NW2d 496 (1991). We review the trial court's factual findings underlying an award of spousal support for clear error. *Moore v Moore,* 242 Mich App 652, 654; 619 NW2d 723 (2000). "The main objective of [spousal support] is to balance the incomes and needs of the parties in a way that will not impoverish either party, and [spousal support] is to be based on what is just and reasonable under the circumstances of the case." *Olson, supra* at 631, citing *Moore, supra* at 654.[4]

The trial court did not abuse its discretion in awarding spousal support to plaintiff. Plaintiff, a widow at the time, married defendant in 1989; therefore, this was a fairly lengthy marriage of approximately 15 years. Plaintiff will soon turn 60 years old and is operating an unprofitable beauty salon, while defendant, who is fours years younger than plaintiff, is earning over $100,000 a year as an electrical lineman, and the evidence indicated that his income level will continue to increase. The monthly $3,000 support award will be reduced to $1,500 a month when plaintiff turns 65, which is only about five years away. At that time, unforeseen circumstances aside, defendant will still likely be earning in excess of $100,000, and defendant, on his retirement, will have the benefit of his full pension and his annuity plan, which, while reduced by the $80,000 award to plaintiff, will most certainly be rebuilt to a significant sum in the coming years.[5] Taking into consideration the relevant spousal support factors, including balancing the income and needs of the parties, we cannot conclude that the trial court abused its discretion in awarding spousal support and in setting the amount of support.

With respect to the property division, this Court in *Gates v Gates*, 256 Mich App 420, 422-423; 664 NW2d 231 (2003), referencing the standards applicable for appellate review of rulings regarding property division and valuation of assets, stated:

> In reviewing a trial court's property division in a divorce case, we must first review the trial court's findings of fact. *Draggoo v Draggoo,* 223 Mich App

---

[4] The factors to be considered in making an award of spousal support were set forth in *Parrish v Parrish*, 138 Mich App 546, 553-554; 361 NW2d 366 (1984). They are: (1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the ability of the parties to work; (4) the source and amount of property awarded to the parties; (5) the age of the parties; (6) the ability of the parties to pay spousal support; (7) the present situation of the parties; (8) the needs of the parties; (9) the health of the parties; (10) the prior standard of living of the parties and whether either is responsible for the support of others; and (11) general principles of equity. *Id.*

[5] The trial court noted that the annuity had already increased in value by $24,000 from the February 2004 date on which the court valued the asset for purposes of property division to the time of the evidentiary hearing in January 2005.

> 415, 429; 566 NW2d 642 (1997), citing *Sparks v Sparks,* 440 Mich 141, 151; 485 NW2d 893 (1992). "If the trial court's findings of fact are upheld, [we] must decide whether the dispositive ruling was fair and equitable in light of those facts. The dispositional ruling is discretionary and should be affirmed unless [we are] left with the firm conviction that the division was inequitable." *Id.* at 429-430, citing *Sands v Sands,* 442 Mich 30, 34; 497 NW2d 493 (1993) . . . .
>
> The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *McNamara v Horner,* 249 Mich App 177, 188; 642 NW2d 385 (2002). The division need not be mathematically equal, but any significant departure from congruence must be clearly explained by the trial court. *Id.* The trial court's disposition of marital property is intimately related to its findings of fact. *Id.* [Alterations in original.]

To reach an equitable property division, the trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station or status in life, each party's earning ability, each party's age, health, and needs, fault or past misconduct, the cause for divorce, and general principles of equity. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996).

While we may not have divided the marital estate in a manner consistent with the trial court's ruling, this panel cannot say that it is left with a firm conviction that the trial court's division was inequitable. There was a substantial depletion of plaintiff's Putnam account and of the equity in the marital home even if one were to accept the dollar amounts testified to by defendant, and while we cannot conclude that defendant was the lone beneficiary of funds from the account and the loan funds secured by the home, the evidence did establish that defendant indeed personally profited and benefited to a great extent from use of these funds. And there is no dispute that plaintiff came into the marriage with the Putnam account and the house being her separate property. Giving the trial court the required deference, we find no error in the court invading 80% of defendant's annuity account to reflect defendant's use of the Putnam and mortgage funds.[6] Additionally, the trial court awarded plaintiff her salon business and related realty and awarded defendant his pension, which the court concluded offset, and there does not appear to be any challenge to that particular ruling. A vacant parcel of land was awarded to plaintiff, but this property was brought into the marriage by plaintiff, and there is no indication on review of the evidence that this piece of property, which was part of plaintiff's separate estate, should be considered part of the marital estate subject to division. See MCL 552.23;

---

[6] As noted above, defendant testified that to the best of his recollection plaintiff had an account that held about $67,000 at the time the parties were married, which he deemed considerable. Defendant also presented evidence indicating that the mortgage debt was approximately $55,000 and not the $90,000 claimed by plaintiff. Given that the Putnam account only held $3,000 at the time of divorce and that the mortgage balance on the home was only $19,000 at the time of marriage, we still are looking at minimally a $100,000 loss in value through the course of the marriage.

MCL 552.401; *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997).[7] In sum, and having considered all of defendant's arguments and the evidence presented, we are not left with a firm conviction that the property division was inequitable.[8] Reversal is unwarranted.

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Michael R. Smolenski

---

[7] The trial court ruled that the "separate lot is hers. I don't hear any claims about that."

[8] Defendant argues that plaintiff was awarded the full $20,000 in her savings account, which, according to defendant, when viewed in the overall division of assets, lends support to the conclusion that the division was inequitable. We note that neither the default divorce judgment nor the "order after evidentiary hearing" expressly address any savings account, although the parties were awarded the personal property in their possession. The court's ruling from the bench failed to touch on the savings account. A review of the transcripts reveals a single statement by plaintiff that she had $20,000 in a savings account, but there is no elaboration on this testimony, nor any attempt by counsel to elicit more testimony regarding the matter. We have no evidence concerning the source of the funds and the time the funds were acquired. On this record, we are not prepared to find the property division inequitable because of this savings account.