

STATE OF MICHIGAN
COURT OF APPEALS

SANNA SAMMAN,

Plaintiff-Counter defendant-
Appellee,

v

JAMAL SAMMAN,

Defendant-Counter plaintiff-
Appellant.

UNPUBLISHED
November 9, 2004

No. 249877
Wayne Circuit Court
LC No. 02-203499-DM

Before: Zahra, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. We affirm.

Plaintiff and defendant entered into an Islamic marriage. The Islamic marriage certificate provided that plaintiff would receive \$15,000 if the parties divorced. Later, in March 1996, they were married in a civil ceremony. The parties lived in a house that defendant owned before the marriage, and had one son.

Plaintiff filed for a civil divorce in January 2002. She attributed the breakdown of the marriage to defendant's arrest for allegedly using the internet to commit a crime where the intended victim was believed to be a minor,¹ and to instances of domestic violence. The parties obtained an Islamic divorce in February 2002. At that time, plaintiff signed a divorce contract acknowledging the receipt of \$15,000, and providing for joint custody of the parties' son.

The parties had few marital assets and \$75,000 in marital debt. Following a bench trial, the trial court awarded plaintiff the marital home to live in along with the \$37,600 marital equity in the home. The court awarded defendant a \$59,400 lien on the home, to be held as security for spousal support and child support payments. Plaintiff was ordered to repay the lien when she remarried, sold the house, or when the parties' child either graduated from high school or reached the age of eighteen, whichever event came first. The trial court awarded the parties'

¹ Defendant pleaded to a lesser offense.

\$75,000 debt, in a home-equity line of credit, solely to defendant. Plaintiff was awarded sole physical custody of the parties' child, and the parties were awarded joint legal custody. Defendant was ordered to pay child support, and \$200 per week in modifiable spousal support for five years.

Defendant argues on appeal that the trial court inequitably distributed the parties' property. We disagree. This Court reviews the trial court's findings in a divorce action of fact for clear error. *McNamara v Horner (After Remand)*, 255 Mich App 667, 669; 662 NW2d 436 (2003), citing *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). If the trial court's findings of fact are withheld, we then decide whether the property division was fair and equitable in light of those facts. *McNamara, supra* at 670. The trial court's property distribution is "intimately related to its findings of facts." *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). This Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses. *Id.* The division need not be mathematically equal, but any significant departure from congruence must be clearly explained. *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003).

To reach an equitable division, the trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each 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 circumstance. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996), citing *Sparks, supra* at 158-160. The determination of relevant factors will vary with the circumstances of each case, and no one factor should be given undue weight. *Sparks, supra* at 158.

Here, the trial court considered the appropriate factors and found that the parties had been married for "slightly over 7 years." Both were in good health. The court noted that defendant had attended college and was capable of earning over \$50,000 a year, while plaintiff had the equivalent of a high school education, spoke little English, and had no significant earning potential. Defendant, who earned the family's only income and took care of their finances, took out a \$75,000 line of credit. Plaintiff, who does not read English, signed the loan papers. Plaintiff testified that she never had access to the money and that she was told that defendant was going to use the money to repair their house. Defendant appears to have been the sole signatory of the account, and he was not able to account for most of the money. Defendant said that \$5000 of the line of credit was used to bail him out of jail, but plaintiff testified that she borrowed the \$5000 bail money from her sister. Defendant also testified that he gave sums of money to plaintiff's family. The court found that, as a result of his illegal activity and domestic abuse, defendant was at fault for the breakdown of the marital relationship. The trial court also found that defendant's testimony lacked credibility.

Defendant contends that the trial court erred by awarding plaintiff all of the marital equity in the home. Defendant also contends that his \$59,400 lien on the home does not represent an equitable division of the property, because he owned the home prior to the marriage. Generally, the marital estate is divided between the parties and each party's separate estate is untouched. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). However, MCL 552.23(1) permits consideration where, as here, the property award is insufficient for the suitable support and maintenance of the custodial parent and the child. *Id.* In light of the unequal earning ability of the parties, the court's finding of fault, and the age of the minor child, we find that the trial

court's inclusion of the lien as part of defendant's property distribution award was a permissible invasion of separate property. We find no abuse of discretion.

Defendant also argues that the trial court erred in imposing on defendant the entire \$75,000 line of credit debt because it was obtained by both parties. Defendant also alleges that the trial court did not consider cash distributions to plaintiff for her mother and brother. The trial court found that \$15,000 was paid to plaintiff as "dowry" for the Islamic divorce, and that defendant's testimony regarding the other expenditures was not credible. Defendant was the sole provider of income and payor of debt during the marriage. The court also found relevant the past domestic violence and the fault on defendant's part in causing the divorce. Plaintiff needed the loan document translated, thought it was for home repairs, and had no access to the line of credit. On this record, we cannot conclude that the trial court's allocation of debt solely to defendant is an abuse of discretion.

Defendant argues that the trial court erred when it factored in its conclusion that plaintiff would be limited to minimum wage employment. Plaintiff has the equivalent of a high school education and speaks and reads very little English. She testified that she tried once before to find work and was unable to do so. Her residence in an Arabic community may increase the possibility of her obtaining employment, but does not change the type of employment for which she is qualified. We find no clear error.

Defendant asserts that he no longer owned a 1988 Dodge van referenced in the court's findings of fact, and that the court failed to award a 1998 Dodge Stratus and a 2000 Dodge van. Contrary to defendant's claim, the judgment of divorce awarded each party the vehicle they were currently using.

Defendant next argues that the trial court incorrectly allowed plaintiff to keep the \$5,000 bond payment made to get defendant out of jail after his arrest. The trial court found that plaintiff's testimony that her sister loaned her the bond money was more credible than defendant's testimony that plaintiff got the money from their basement. This Court gives special deference to a trial court's findings when based on the credibility of the witnesses. *Draggoo, supra* at 429; *Stoudemire v Stoudemire*, 248 Mich App 325, 339; 639 NW2d 274 (2001); *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). We find no abuse of discretion.

Defendant contends the trial court's division of property was prejudiced by the attempt to place the felony information into evidence, and by the admission of the nolo contendere plea into evidence. Defendant stipulated to the nolo contendere plea at trial and is therefore precluded from arguing this issue on appeal. A party cannot stipulate to a matter and then argue on appeal that the resultant action was error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001).

Next, defendant argues that plaintiff's attorney made several inflammatory statements that prejudiced the court. Defendant also argues that the trial court unreasonably divided the parties' marital property on the basis of plaintiff's testimony, and that plaintiff was an unreliable witness. As previously noted, this Court gives special deference to a trial court's findings when based on the credibility of the witnesses, *Draggoo, supra* at 429, and we decline to revisit the question of credibility here. In light of all the circumstances here, we conclude that the property

division was fair and equitable and find no abuse of discretion. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d (1993).

Defendant's second claim on appeal is that the trial court erred in its property division because it denied recognition of the parties' Islamic marriage and divorce contracts. Defendant contends that the marriage contract should be recognized as a prenuptial agreement limiting plaintiff to a \$15,000 property settlement and that the divorce contract should be recognized as affirming the property distribution portion of the marriage contract, and as awarding the parties joint custody of their son.

This Court has visited the issue of religious marriage contracts in the event of divorce once before. In *Deal v Deal*, 197 Mich App 739, 741; 496 NW2d 403 (1993), this Court held that because plaintiff failed to request specific performance of an Orthodox Jewish marriage contract and did not introduce the contract into evidence, plaintiff did not preserve the issue of its enforcement for appeal. MCR 2.111(F)(3) requires affirmative defenses to be asserted in a party's responsive pleading. Likewise, in the present case, the trial court considered the contract an affirmative defense that defendant failed to plead. The trial court was, however, clearly aware of the religious marriage contract and took it into account in the property division in this case.

Defendant's third issue on appeal is that, in making its custody award of the minor child, the trial court erred in determining the best interest factors under MCL 722.23(a), (b), (c), (d), (e), (f), and (h). All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994). This Court will affirm trial court's findings as to each custody factor unless the evidence clearly preponderates in the opposite direction. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). In reviewing the findings, we defer to the trial court's determination of credibility. *Mogle, supra* at 201.

The trial court found the parties equal on most of the statutory factors, and we are not convinced that those findings were against the great weight of the evidence. Both parties clearly love their son and want what is best for the child. The trial court found that factor (j) favored defendant, and that factors (d), (e) and (f) favored plaintiff. On factor (d) (the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity), the trial court found that the child "is currently living with his mother in a stable, satisfactory environment," and that defendant's "current living arrangements are unsuitable." The evidence showed that plaintiff and the child remained in the marital home, while defendant relocated at least twice, and lived on the first floor of a house with a woman, his brother and sister-in-law, and their three children. Defendant testified that he slept on the couch and his brother and sister-in-law slept on a mattress in the dining room. On this record, the trial court's finding that this factor favored plaintiff was not against the great weight of the evidence.

On factor (e) (the permanence, as a family unit, of the existing or proposed custodial home or homes), the trial court found that plaintiff's family unit consists of herself, her child, and her family, and that defendant's family unit is unclear because of his current living situation. There was conflicting testimony about whether defendant and his landlady were romantically

involved and whether they had an Islamic marriage. Plaintiff and the child remained in the marital home, while defendant relocated multiple times and had a cramped living situation. The trial court's finding that this factor favored plaintiff was not against the great weight of the evidence.

On factor (f) (the moral fitness of the parties involved), the trial court found that defendant's testimony regarding the internet contact related to his arrest was not credible. The trial court also found convincing the testimony that defendant had allowed his son to watch naked women on television, and considered the claims that defendant has remarried under Islamic law. Defendant provided vague and conflicting testimony regarding these issues. The trial court found that defendant lacked credibility, and we again defer to that determination. The trial court's finding that this factor favored plaintiff was not against the great weight of the evidence. On this record, the trial court did not abuse its discretion in awarding physical custody to plaintiff. *Fletcher, supra*.

Finally, defendant argues that the trial court erred in awarding plaintiff spousal support and imputing income to defendant. We disagree. The trial court's findings of fact are reviewed for clear error. *Korth v Korth*, 256 Mich App 286, 288; 662 NW2d 111 (2003). A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake was made. *Moore v Moore*, 242 Mich App 652, 654-655; 619 NW2d 723 (2000). If the trial court's findings of fact are not clearly erroneous, this Court must determine whether the ruling was fair and equitable, considering the facts. *Korth, supra* at 288.

The trial court has the discretion to award spousal support under MCL 552.23. *Id.*; *Ianitelli v Ianitelli*, 199 Mich App 641, 642; 502 NW2d 691 (1993). The main purpose of spousal support "is to balance the incomes and needs of the parties in a way that will not impoverish either party," and it should be just and reasonable given the circumstances of the case. *Moore, supra* at 654. The factors to be considered in deciding whether to award spousal support are similar to those considered in property distribution. *Hanaway v Hanaway*, 208 Mich App 278, 295; 527 NW2d 792 (1995). The trial court's decision regarding spousal support must be affirmed unless this Court is firmly convinced that it was inequitable. *Sparks, supra* at 152.

In awarding plaintiff modifiable spousal support of \$200 per week, for five years, the court did not give any one factor undue weight, and stated that spousal support was necessary because plaintiff should not have to use her property award to support herself. Defendant argues that plaintiff is not entitled to this spousal support because she testified that she thought she could work in a relative's restaurant. The trial court considered all required factors and made specific findings about each factor. The record supports the trial court's findings that plaintiff is limited to minimal employment because of her education level, and her lack of English speaking and reading skills.

In awarding plaintiff spousal support, the court imputed an annual income of \$50,000 to defendant because he had done nothing to find similar employment since his termination. Defendant argues that the court erred in imputing income because he did not voluntarily leave his employment and is appealing his termination, and because plaintiff testified that she could become employed. However, the ability to pay spousal support includes the voluntary unexercised ability to earn income. *Moore, supra* at 654. While defendant did not voluntarily leave his job, he has voluntarily remained unemployed. Despite a pending appeal of his

termination, he could have pursued similar employment and did not. Defendant has not shown that the trial court erred in imputing income to him.

The spousal support award is modifiable in the event of changed circumstances. The five-year period will allow plaintiff time to pursue the education, employment, and language skills that she needs to support herself. We find no abuse of discretion.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Michael J. Talbot