

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA10-451

BIANCA BROGGI-DUNN
APPELLANT

V.

ERNEST E. DUNN
APPELLEE

Opinion Delivered January 26, 2011

APPEAL FROM THE LONOKE
COUNTY CIRCUIT COURT
[NO. DR-2009-34]

HONORABLE SANDY HUCKABEE,
JUDGE

AFFIRMED IN PART; REVERSED
AND REMANDED IN PART

ROBIN F. WYNNE, Judge

Appellant Bianca Broggi-Dunn appeals from the division of property made by the circuit court in her divorce case against appellee Ernest Dunn. Specifically, Ms. Broggi-Dunn argues that the circuit court inequitably divided the parties' real property and Mr. Dunn's military-retirement benefits. We affirm as to the real property but reverse and remand as to the military-retirement benefits.

The parties were married on November 21, 1998, but separated in January 2008. In January 2009, Mr. Dunn filed for divorce on the grounds of general indignities. In a temporary order entered on February 22, 2009, the circuit court granted temporary possession of the marital home to Ms. Broggi-Dunn and allowed access to the exterior of the home and barn area to Mr. Dunn. Mr. Dunn was ordered to make the mortgage payment, while

Ms. Broggi-Dunn was ordered to make payments on a line of credit owed on the home. Over the following months, Ms. Broggi-Dunn failed to make the payments as ordered and failed to pay certain utility bills for the marital home that were in Mr. Dunn's name, leading Mr. Dunn to make the payments in order to protect his credit rating.

Mr. Dunn amended his complaint in June 2009 and August 2009 to allege grounds of eighteen months of continuous separation or, in the alternative, general indignities. Court-ordered mediation failed to produce a property-settlement agreement, and the case proceeded to a final hearing on October 26, 2009.

At the hearing, Mr. Dunn, who was forty-four years old at that time, testified regarding his contributions to the marital estate and introduced evidence of his current financial status, marital property, and marital debt. He submitted an affidavit of financial means showing the total amount of unsecured debt in his name to be \$35,909. Mr. Dunn's sole source of income was his military pension, a portion of which was earned during the marriage. Before deductions, his military-retirement benefit was \$2,390 per month. Mr. Dunn testified that the mortgage debt for the marital home was approximately \$104,000, and the line-of-credit debt associated with the home was approximately \$9,800. Mr. Dunn believed, however, that the property was worth less than \$100,000. During cross-examination, Ms. Broggi-Dunn's attorney introduced a printout from the county tax assessor's website valuing the property at \$129,950. The printout also showed that the parties had purchased the home for \$118,000 in 2004. Mr. Dunn testified that the home had deteriorated significantly during

the time he was stationed overseas and in the year leading up to the hearing, due to lack of maintenance.

Ms. Broggi-Dunn, who was forty-eight years old at that time, introduced an affidavit of financial means showing the total amount of unsecured debt in her name to be \$15,562. She testified that she worked during most of the marriage but was unemployed during much of 2006. She currently earned \$579 biweekly but was unable to meet her financial obligations while the divorce was pending. Ms. Broggi-Dunn also acknowledged that, if the marital home were to be sold, there could be a surplus or a deficiency, as the exact sale price of the home could not be predicted.

Following the hearing, Mr. Dunn was granted a divorce and was awarded the marital home, his full military-retirement benefits, bank accounts in his name, and savings bonds. Ms. Broggi-Dunn was awarded her own bank accounts and stocks. The remainder of the personal property was to be sold at public auction, with the costs of the sale and net proceeds to be divided equally between the parties. Mr. Dunn was assigned responsibility for the mortgage and line of credit associated with the marital home, as well as all other debts in his name, while Ms. Broggi-Dunn was assigned responsibility for her own credit card balances and other debts in her name. Although these unsecured debts were listed in the parties' names as individuals, they were considered by the circuit court to be marital debts. The parties were further ordered to file joint state and federal income tax returns for 2007 and 2008 and to equally divide the costs of tax preparation, tax liabilities, and tax refunds.

In its divorce decree, entered January 6, 2010, the circuit court explained its reasons for dividing the property as it did. The court found that the mortgage debt and debt owed on the home-equity line of credit, which were both assigned to Mr. Dunn, offset any value in the marital home. It also found that Mr. Dunn's military-retirement interest was partially marital and partially non-marital, but because Mr. Dunn was assigned responsibility for substantial marital debts and had made payments that had been previously assigned to Ms. Broggi-Dunn under the temporary order, the court found that Mr. Dunn should receive the entirety of the benefits. The court also considered that, during several years of the marriage, Mr. Dunn had contributed to the marital estate while Ms. Broggi-Dunn had not.

Ms. Broggi-Dunn moved for reconsideration of the property division, arguing that the division was inequitable. She also moved for a new trial. In the meantime, Ms. Broggi-Dunn timely filed her notice of appeal on February 5, 2010, while Mr. Dunn filed several motions for contempt. In a hearing held on February 17, 2010, the circuit court denied the pending motions for contempt and the motion for a new trial. The motion for reconsideration was deemed denied.

For her appeal, Ms. Broggi-Dunn argues that the circuit court inequitably divided the marital property by granting the marital home and full military-retirement benefits to Mr. Dunn. We review divorce cases de novo and affirm a trial court's division of property and allocation of debt unless the decision is clearly erroneous. *Farrell v. Farrell*, 365 Ark. 465, 469, 231 S.W.3d 619, 622 (2006); *Evtimov v. Milanova*, 2009 Ark. App. 208, at 10, 300 S.W.3d

110, 117. A finding is clearly erroneous when, after reviewing the entire evidence, the appellate court is left with the firm conviction that a mistake has been made. *Farrell*, 365 Ark. at 469, 231 S.W.3d at 622. We give due deference to the trial court's superior position to weigh the evidence and determine the credibility of the witnesses before it. *Id.*

Pursuant to Arkansas Code Annotated section 9-12-315(a)(1)(A) (Repl. 2009), at the time a divorce decree is entered, the circuit court should distribute half of the marital property to each party, unless the court finds that such a division would be inequitable. In that event, the court must make some other division that it deems equitable and must state its basis and reasons for not dividing the marital property equally. Ark. Code Ann. § 9-12-315(a)(1)(B). Any exception to the rule of equal division depends upon the specific facts of the case as reflected by the trial court's findings and conclusions. *Gentry v. Gentry*, 282 Ark. 413, 415, 668 S.W.2d 947, 948 (1984). The statute does not require mathematical precision in dividing the property; it merely requires that the marital property be distributed equitably. *Copeland v. Copeland*, 84 Ark. App. 303, 308, 139 S.W.3d 145, 149 (2003).

With respect to the marital home, Ms. Broggi-Dunn argues that the fair-market value of the home was in question and, therefore, the home should have been sold and the proceeds divided in order to make an equitable division of the property. We disagree. The evidence before the circuit court showed that, although the parties had purchased the home for \$118,000, the most recent tax assessment valued the property at \$129,950. However, the evidence indicated that the home had deteriorated under Ms. Broggi-Dunn's care, and

Mr. Dunn believed the home to be worth less than what was owed. The circuit court obviously found more credibility in Mr. Dunn's valuation of the property than Ms. Broggi-Dunn's, and it was within its discretion to do so. The debt associated with the real estate totaled approximately \$113,000. While it is impossible to predict how much the home might be worth to a potential buyer, the circuit court apparently found that the home would bring no more than \$113,000 at an auction, at best, or that the sale of the home would result in a deficit, at worst. Thus, the circuit court found that this debt offset any value in the home and gave both to Mr. Dunn, stating its reasons in its decree. Under these circumstances, we cannot say that the circuit court clearly erred with respect to the award of the marital home and its associated debts.

With respect to the military-retirement benefits, however, the circuit court's award of the entire benefit to Mr. Dunn was inequitable. Although the circuit court reasoned that, because Mr. Dunn shouldered the bulk of the marital debt, Ms. Broggi-Dunn should not share in the marital portion of Mr. Dunn's pension, the court failed to compare the amount of debt from which Ms. Broggi-Dunn was relieved to the amount and duration of retirement benefits of which she was deprived. Mr. Dunn was assigned responsibility for approximately \$20,000 more unsecured marital debt than was assigned to Ms. Broggi-Dunn. The gross amount of his monthly military pension was \$2,390. The difference between the amount of unsecured marital debt assigned to each party is equal to less than a year's worth of the full

monthly pension (i.e. \$2,390 for nine months is equal to \$21,510).¹ In other words, after a certain point, the extra marital debt assigned to Mr. Dunn would be paid off, but his continued receipt of the entire monthly pension would result in a substantial windfall, especially considering the parties' relatively young ages. From Ms. Broggi-Dunn's perspective, she would be denied a significant source of income for, potentially, twenty-five years or more, depending on how long the parties live. This would be plainly unfair to Ms. Broggi-Dunn.

Because the apportionment of the military-retirement benefits is inequitable, we remand this case to the circuit court to determine an equitable division of the marital portion of the monthly military pension, in light of the specific facts and circumstances of the case. *See Womack v. Womack*, 16 Ark. App. 139, 143, 698 S.W.2d 306, 308 (1985). The circuit court has discretion to make other adjustments to the division of property and unsecured-debt responsibility that it deems necessary as a consequence of our holding.

Affirmed in part; reversed and remanded in part.

ROBBINS and GLOVER, JJ., agree.

¹This calculation does not take into account the withholding of taxes.