

STATE OF MICHIGAN
COURT OF APPEALS

JOHN HUSS PIMM, JR.,

Plaintiff-Appellant,

v

MARIE ALICE PIMM,

Defendant-Appellee.

UNPUBLISHED

May 29, 2008

No. 273355

Kent Circuit Court

LC No. 04-010231-DM

Before: Bandstra, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce entered following a bench trial. We affirm.

On appeal, plaintiff challenges the trial court's valuation of his two businesses: Marquis Industries, Inc., and FEAT, LLC. There is not just one proper method to determine the value of business assets for the purpose of distributing marital property. *Kowalesky v Kowalesky*, 148 Mich App 151, 155-156; 384 NW2d 112 (1986). "[W]here a trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present." *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

At trial, defendant presented the testimony of a certified public accountant (CPA), qualified as an expert in the area of business appraisals and valuations, to support her valuation of Marquis Industries. The CPA originally valued Marquis Industries at approximately \$855,000 as of February 28, 2005. However, based on new financial information following the end of the company's fiscal year on May 31, 2005, the CPA prepared an updated valuation report valuing the company at \$1,385,447. The trial court ultimately valued Marquis Industries at \$1,129,793, which made plaintiff's interest, as a 50 percent owner, equal to \$564,897. This amount was less than the valuation of \$692,723 (50 percent of \$1,385,447) advanced by defendant. Plaintiff nevertheless argues that, because sales revenues were less than the CPA had originally projected, the trial court erred in using the valuation of the CPA, who calculated that the company increased in value based on the 2005 fiscal year-end figures. We disagree.

First, the record reveals that the trial court did not accept the CPA's revised valuation at face value. The trial court noted that plaintiff was correct in questioning the impact of a subsidiary company, P & D Sales, on the overall valuation of the business, and the record reveals that the trial court eliminated the values associated with P & D Sales when calculating a value

based on the market approach. The trial court's valuation was within the range of proofs presented at trial. *Id.* at 171.

It is also important to note that, while defendant presented a CPA as an expert witness, plaintiff did not call anyone, aside from the company accountant, to testify. Plaintiff failed to present evidence to rebut the CPA's opinion that Marquis Industries increased in value as evidenced by the 2005 fiscal year-end figures. Rather, plaintiff relied on the bare assertion that a company with a loss of money and declining sales revenue in the most recent fiscal year cannot increase in value. However, the CPA adequately explained how he arrived at the updated value, and the trial court pointed out that part of the loss emphasized by defendant had already been taken into account in the CPA's initial valuation. The trial court had broad discretion to use the figures from the end of the fiscal year on May 31, 2005, when arriving at a valuation, see, e.g., *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997), and also had the discretion to make its own determination of value. *Jansen, supra* at 171. Moreover, the court acted within its discretion in rejecting plaintiff's argument, which he also makes on appeal, that the CPA erroneously considered the effect the elimination of officer bonuses had on the valuation of the company. The trial court's factual findings were supported by the record, and the trial court did not clearly err in valuing plaintiff's 50 percent ownership interest in Marquis Industries at \$564,897.

With respect to FEAT, LLC, plaintiff testified that he was the 100 percent owner, that the company had been in existence for about one year, and that he had invested \$70,000 or \$80,000 of marital funds into it. Plaintiff testified that although he had not yet generated sales to recoup his investment cost, he anticipated that the company would eventually produce revenue and that he would not have made the investment otherwise. Plaintiff also testified that, although he did not think the company had a value at the time of trial, he would sell it to someone for \$70,000-\$80,000, or less. The trial court ultimately valued FEAT, LLC, at \$50,000.

"Fair market value is the amount at which a willing buyer and a willing seller would arrive in an open and competitive market." *Huron Ridge LP v Ypsilanti Twp*, 275 Mich App 23, 41; 737 NW2d 187 (2007). The trial court exercised its discretion in selecting a value between the holder's interest and the likely fair market value. Although plaintiff invested \$70,000 or \$80,000 into the company, he had not yet recouped that investment, because the business had only been in existence for one year. Also, plaintiff testified that he would sell FEAT, LLC, for less than that amount. The trial court did not clearly err in valuing FEAT, LLC, at \$50,000. The amount was within the range of proofs at trial. *Jansen, supra* at 171.

Plaintiff also argues that the trial court erred in failing to afford more weight to the evidence presented regarding his decline in income from \$27,500 to \$17,500 a month when determining the amounts of child support and spousal support to be awarded. We review findings of fact (here, the amount of plaintiff's income) for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). The trial court's findings are presumptively correct, and it is the appellant's burden to show clear error. *Olson v Olson*, 256 Mich App 619, 629; 671 NW2d 64 (2003). "If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Id.* at 629-630. The trial court's decision regarding support must be affirmed unless we are firmly convinced that it was inequitable. *Id.* at 630.

At trial, plaintiff testified that, although he was a 50 percent shareholder of Marquis Industries, the decision to drastically reduce his salary in the year of the divorce was made by his brother and the company manager. However, plaintiff also testified that he and his brother normally set a base salary, which was the same for each, and then split the remainder of profits equally in the form of bonuses. Further, the company accountant testified that plaintiff and his brother had reduced their compensation to accommodate the cash flow of the business in the past. Thus, there was evidence to support the trial court's finding that plaintiff had a certain degree of control over his income and ultimately the company's fate, depending on the amount of salary he elected to receive. At trial, plaintiff tried to minimize the extent of his involvement in setting his own salary and bonuses, despite his 50 percent interest in the company. He wanted spousal support and child support to be based on his severely reduced income. However, the trial court's findings are presumptively correct, and plaintiff has failed to meet his burden of demonstrating clear error. *Id.* at 629. It is evident from the trial court's opinion that it did not attribute great weight to plaintiff's professed lack of involvement in determining his own income. This is a credibility argument, and we must "defer to the trial court's superior position to observe and evaluate witness credibility." *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002).

Additionally, we find that the trial court's awards of child support in the amount of \$2,900 a month and spousal support in the amount of \$8,000 a month were fair and equitable in light of the facts. As noted by defendant, the trial court arrived at the child support award by selecting a midpoint between the parties' suggested amounts of child support. Further, the trial court specifically provided that either party could petition for a child support review within six months of the entry of the judgment of divorce to specifically examine the 2005 income figures of both parties. The child support award was within the range of proofs at trial. *Jansen, supra* at 171.

Also, the trial court made extensive findings of fact in determining the award of spousal support, and plaintiff does not challenge those findings here. The trial court correctly noted that the main objective of spousal support is "to balance the incomes and the needs of the parties in a way that will not impoverish either party." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). Focusing on the "economic reality" of the parties, the trial court found that defendant would "not be in a position to earn the amounts available to Plaintiff via his investments, entrepreneurship, or wages," and it awarded defendant \$8,000 a month in spousal support. The trial court specifically provided that the award was modifiable based on new facts or changed circumstances that may arise after entry of the judgment of divorce.

On the record before us, the trial court's support awards were fair and equitable in light of the facts available at the time the trial court made its decision, and plaintiff has the opportunity to seek modification of those obligations in the event that his income remains at \$17,500 a month or further decreases in the future.

Plaintiff next argues that the trial court erred in finding him primarily at fault in the breakdown of the marriage. Specifically, plaintiff argues that the trial court should not have considered his extramarital relationship with a woman that began in April 2005, after the divorce action was filed in October 2004; that the trial court erred in attributing weight to his decision to have a vasectomy in 1991, years before the divorce proceedings; and that the trial court did not attribute sufficient weight to the fact that the parties' lack of communication led to the

breakdown of the marriage. We review for clear error the trial court's findings of fact, including a finding of fault. See *Olson, supra* at 629, 631. As noted earlier, "[i]f the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Id.* at 629-630. The trial court's decision must be affirmed unless we are convinced that it was inequitable. *Id.* at 630.

"[A] party's fault in causing the divorce is a valid consideration in dividing the marital assets or awarding alimony." *Kurz v Kurz*, 178 Mich App 284, 295; 443 NW2d 782 (1989). "In determining 'fault' as one of the factors to be considered when fashioning property settlements, courts are to examine 'the conduct of the parties during the marriage.'" *Welling v Welling*, 233 Mich App 708, 711; 592 NW2d 822 (1999), quoting *Sparks v Sparks*, 440 Mich 141, 157; 485 NW2d 893 (1992). The issue is whether "one of the parties to the marriage [wa]s more at fault, in the sense that one of the parties' conduct presented more of a reason for the breakdown of the marital relationship than did the conduct of the other." *Welling, supra* at 711. As in *Welling, supra* at 711, the record herein supports that "[t]he effect of [plaintiff's] conduct on [defendant] and the marital relationship was highly detrimental . . ." Plaintiff's conduct "presented more of a reason for the breakdown of the marital relationship than did the conduct of [defendant]." *Id.* at 711. The trial court did not clearly err in finding that plaintiff's affairs, both before and after he filed for divorce, were relevant to his fault in the breakdown of the marriage.

Plaintiff also challenges the trial court's characterization of his vasectomy as a "secret and unilateral decision," and argues that the trial court should not have given weight to it because defendant forgave him. Plaintiff argues that his decision to have the vasectomy was not secret and unilateral because defendant signed the consent form at the hospital to authorize the procedure. However, defendant testified that plaintiff decided to have the surgery done without first discussing it with her, went forward with plans for the surgery without her permission, and made her sign the consent form at the hospital. Further, although defendant testified that she had forgiven plaintiff for the vasectomy and that it was "no longer an issue," she also testified that it was a "devastating event" that altered the marriage. There was evidence that defendant blamed plaintiff's vasectomy (and subsequent reversal) for the miscarriage she suffered more than four years later. The trial court did not clearly err in finding that the vasectomy constituted fault for the breakdown of the marriage. Although it occurred many years before plaintiff filed for divorce, the record is clear that it was an event that set in motion a rift between the parties, ultimately contributing to problems leading to the breakdown of the marriage.

Plaintiff also argues that the trial court erred in failing to attribute sufficient weight to evidence that the parties' lack of communication led to the breakdown of the marriage. Plaintiff attributed the failure of the marriage to the parties' breakdown in communication. However, plaintiff admitted that, even though defendant asked him to go to marriage counseling, they never tried it and he did not really want to try it. Further, defendant testified that if plaintiff had raised his concerns with her, they "could have gone and done something about it." The trial court noted that "[w]hile it is argued by [p]laintiff that the marriage was effectively over fifteen (15) years before the filing, his reasoning of a lack of communication, indifferences to his business interests and his unilateral decision for a 1991 vasectomy are neither convincing or weighty when placed on the scales with his affair." The trial court did not err in declining to attribute significant weight in the breakdown of the marriage to the parties' lack of communication.

Finally, plaintiff argues that the trial court erred in finding him at fault for the breakdown of the marriage simply because “he wanted out of the marriage and [defendant] did not.” However, the trial court did not make such a finding. Rather, it found that plaintiff was at fault for the breakdown of the marriage due to his vasectomy and extramarital affairs, and those findings are not clearly erroneous.

The question then becomes whether the trial court’s dispositive rulings regarding spousal support and property division were fair and equitable in light of the trial court’s findings of fact. *Welling, supra* at 712. The trial court’s role “is to achieve equity, not to ‘punish’ one of the parties.” *Sands v Sands*, 442 Mich 30, 36; 497 NW2d 493 (1993). Contrary to plaintiff’s argument, a review of the record does not support his contention that the trial court gave his fault undue or disproportionate weight in dividing the marital estate and awarding spousal support. The trial court properly considered the factors that are relevant to the disposition of marital assets and an award of spousal support as set out in *Sparks, supra* at 159-160, and *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993). While the trial court discussed plaintiff’s infidelity and vasectomy, it did not place undue emphasis on the issue of plaintiff’s fault. Rather, it was simply one of many factors contributing to the ultimate distribution of marital assets and award of spousal support. The trial court found that the marriage was of a significant duration; that both parties significantly contributed to the marriage, with plaintiff being the primary income producer and defendant raising the parties’ three children; that both parties led an affluent lifestyle; and that plaintiff’s earning ability and potential significantly exceeded that of defendant. The trial court then determined that a roughly 50-50 property division would enable both parties to live a comfortable and reasonably secure life for the foreseeable future, and that spousal support was necessary and appropriate based on those factors. Plaintiff’s contention that the trial court unfairly punished him for his conduct and placed undue or disproportionate emphasis on his fault is simply not supported by the record. Rather, the record reveals that the trial court properly considered all the relevant factors in dividing the marital estate and awarding spousal support.

A division of marital property must be equitable and “roughly congruent.” *Jansen, supra* at 171. A review of the record reveals that the trial court’s property division was roughly congruent. 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 it is “to be based on what is just and reasonable under the circumstances of the case.” *Moore, supra* at 654. A review of the record reveals that the trial court’s award of spousal support to defendant in the amount of \$8,000 a month was just and reasonable under the circumstances of the case. The property division and award of spousal support was not inequitable.

Plaintiff also argues that the trial court erred in retroactively modifying child support to October 2005, contrary to MCL 552.603. Modification of a child support order is a matter within the trial court’s discretion; however, whether the trial court committed a statutory violation by ordering a retroactive modification of support is a question of law that is reviewed de novo. See *Burba v Burba (After Remand)*, 461 Mich 637, 647; 610 NW2d 873 (2000), and *Paulson v Paulson*, 254 Mich App 568, 571; 657 NW2d 559 (2002). Generally, a child support order cannot be retroactively modified. See MCL 552.603(2) (“a support order that is part of a judgment or is an order in a domestic relations matter is a judgment on and after the date the support amount is due as prescribed in section 5c . . . and is not, on and after the date it is due,

subject to retroactive modification”); see also *Harvey v Harvey*, 237 Mich App 432, 437-438; 603 NW2d 302 (1999). However, the prohibition does not apply to ex parte interim support orders or temporary support orders. See MCL 552.603(3) (“[t]his section does not apply to an ex parte interim support order or a temporary support order entered under supreme court rule”); see also *Proudfit v O’Neal*, 193 Mich App 608, 611; 484 NW2d 746 (1992) (“retroactive modification of temporary child support orders . . . is permissible”). Further, MCR 3.207(C)(5) provides that “[a] temporary order remains in effect until modified or until the entry of the final judgment or order.”

On April 26, 2005, the trial court signed the parties’ stipulation that required plaintiff to pay defendant \$3,000 a month to use as support for herself and the parties’ minor child, beginning April 1, 2005. The order was clearly a temporary support order to which the prohibition on retroactive modification does not apply, pursuant to MCL 552.603. The trial court properly exercised its discretion and did not err in awarding retroactive child support in this case.

Finally, in affirming the judgment of divorce, we would be remiss if we ignored defendant’s attorney fee request. In the “relief requested” section of her brief on appeal, defendant asks this Court to grant her continuing attorney fees. Below, defendant requested \$25,098.09 in attorney fees, and the trial court awarded her \$25,000. The trial court awarded that sum but indicated that it could possibly be changed if defendant requested an evidentiary hearing relating to those fees within 30 days after the entry of the judgment of divorce. Defendant did not make such a request. The trial court later denied defendant’s motion for reconsideration and motion for relief from judgment, which asserted in part that plaintiff should continue to be held accountable for attorney fees that have accrued since October 3, 2005. Defendant states that since that time, she has incurred additional attorney fees in the amount of \$27,029.25. However, “an appellee that has not sought to cross appeal cannot obtain a decision more favorable than was rendered by the lower tribunal.” *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). Accordingly, we decline defendant’s request for continuing attorney fees.

Affirmed.

/s/ Richard A. Bandstra

/s/ Patrick M. Meter

/s/ Jane M. Beckering