

STATE OF MICHIGAN
COURT OF APPEALS

CAROL SUE PRESTON WARD,

Plaintiff-Appellee,

UNPUBLISHED
October 15, 2013

v

WILLIAM FRANK WARD,

Defendant-Appellant.

No. 310523
Ionia Circuit Court
LC No. 10-028153-DO

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by leave granted from the parties' judgment of divorce. At issue is the court's decision to award plaintiff a Qualified Domestic Relations Order (QDRO) in the amount of \$35,400. We affirm.

Plaintiff and defendant divorced after a little over two years of marriage. At the hearing on her request for temporary spousal support, plaintiff testified that she had purchased in full the marital home prior to the marriage. During the marriage, plaintiff testified, she and defendant jointly obtained a mortgage on the home, using the funds to fix up the house and pay off defendant's debts. Plaintiff asserted that the loan was for \$35,000, and testified that "a little over \$30,000" was still owed as of the hearing. According to plaintiff, defendant paid the approximately \$439 monthly mortgage, as well as \$435 in utilities. Plaintiff was seeking \$800 in temporary spousal support to help cover the mortgage and utilities payments. Plaintiff testified that defendant was then receiving about \$500 from his pension and \$2,100 in social security disability. Plaintiff testified that she was unable to work due to health problems. The court awarded plaintiff temporary spousal support of \$800 a month. Plaintiff later testified at trial that defendant partially complied with the order, paying \$500 for the mortgage directly to the bank from December 2010 through May 2011, leaving an arrearage owed of \$6600.

In July 2011, plaintiff filed a motion to show cause, asserting that defendant had failed to comply with the support order. Defendant's attorney explained at the hearing on the motion that defendant had been receiving inpatient care at Pine Rest Christian Mental Health Services in the weeks prior to the hearing. Defendant's attorney represented that defendant has a myriad of physical and mental ailments. Defendant testified that he received \$2,000 in social security benefits and \$540 in pension benefits.

At trial,¹ defendant was not present, and his attorney indicated that defendant was in Texas and that defendant was aware of the trial date. The trial court had taken proofs from the plaintiff to establish the statutory grounds for divorce at a previous hearing. The trial was on the property settlement. At that time, the house was in foreclosure and plaintiff testified that she could not afford to redeem it. Plaintiff testified that she receives \$449 a month from Michigan Supplemental Security Insurance (SSI) and \$200 a month in food stamps, but that she does not qualify for social security disability benefits. She testified that defendant's pension benefits were going to increase by \$400 starting in January 2012.

The court concluded that defendant's pension benefits were going to be \$900 per month, and that combined with disability benefits, his income was \$3,000 per month, based on the uncontested testimony. The court stated that defendant's "pension is 30% of his total income." Defendant indicates that the trial court then indicated that defendant's total income was \$3,900, which it clearly did based on the transcript. However, the court concluded that defendant would pay a QDRO of \$35,400, which consisted of three years of rehabilitative support at \$800 per month, plus \$6,600 to cover the arrearages on the court's temporary spousal support order.

The court then entered a default judgment for divorce in favor of the plaintiff consistent with the court's findings on the record. On appeal, defendant claims that the distribution was inequitable because the court failed to consider what effect the award would have on him considering his age, health, expenses, and contribution to the marital estate.

The grounds for default in divorce cases are the same as in other cases. If a party fails to participate by not attending a hearing, the court may enter a default judgment against that party. MCR 2.401(G)(1), 506(F)(6); see e.g., *Musico v Musico*, 62 Mich App 167, 168-169; 233 NW2d 224 (1975). "A default judgment will not be disturbed on appeal absent a clear showing of abuse." *Musico*, 62 Mich App at 170 (citing *Seifert v Keating*, 344 Mich 456, 464; 73 NW2d 894 (1955); *Rhodes v Rhodes*, 3 Mich App 396, 403; 142 NW2d 508 (1966)).

In this case defendant failed to appear at trial. The trial court judge did not abuse her discretion by entering a default judgment against him. After a careful review of the record, we are convinced that "no manifest justice will result if this judgment stands." *Musico*, 62 Mich App at 169-170. The judgment incorporated the QDRO, which was fair and equitable to both parties. *Id.*

Because the defendant failed to show a clear abuse of discretion, the default judgment will not be disturbed. *Id.* However, even if the merits of the case were considered, the default judgment and the spousal support contained therein would still stand.

¹ Defense counsel informed the court he was not ready to proceed because of the lack of communication he had with defendant. The court granted counsel's request to withdraw.

Alimony awards and division of property are subject to the same standard of review. *Berger v Berger*, 277 Mich App 700, 727; 747 NW2d 336 (2008). “The appellate court must first review the trial court’s findings of fact under the clearly erroneous standard.” *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). “A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been committed . . . [I]f the trial court’s view of the evidence is plausible, the reviewing court may not reverse.” *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). “If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts . . . [T]he ruling should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable.” *Sparks*, 440 Mich at 152.

Defendant first argues that the QDRO was a property distribution, not an alimony award. Caselaw delineates two types of spousal support: alimony in gross and periodic alimony. *Staple v Staple*, 241 Mich App 562, 566; 616 NW2d 219 (2000). Where periodic alimony is usually indefinite in terms of the time period in which it is to be paid and the total sum to be paid, “[a]limony in gross is a sum certain and is payable either in one lump sum or by periodic payments of a definite amount over a specific period of time.” *Turner v Turner*, 180 Mich App 170, 172; 446 NW2d 608 (1989). *Staple*, 241 Mich App at 566 observes that “alimony in gross is not really alimony intended for the maintenance of a spouse, but rather in the nature of a division of property.” See also *Edgar v Edgar*, 366 Mich 580, 587; 115 NW2d 286 (1962) (stating that “alimony in gross is not really alimony intended for the maintenance of a spouse, but rather is in the nature of a division of property”).

Because the QDRO and the default judgment ordered the defendant to pay spousal support of \$800 per month from December 1, 2010 until December 1, 2014, it is “a sum certain payable by . . . periodic payments of a definite amount over a specific period of time,” and is by definition, alimony in gross. *Turner*, 180 Mich App at 172. Alimony in gross is of the nature of division of property, therefore the QDRO was a division of property. However the defendant has made no showing that the trial court committed clear error in its findings of facts. Although the members of this Court may not have made the same findings or conclusions as to property division, the record shows that the trial court judge made sufficient findings of fact to support the judgment.

The record establishes that plaintiff could not support herself without additional income. Plaintiff testified that she had arthritis and fibromyalgia and was currently unable to work. Furthermore, plaintiff indicated that she did not qualify for social security disability and her only income is \$449 in SSI and \$200 in food stamps. Thus the court was justified in invading defendant’s premarital assets because the marital assets were “insufficient for her suitable support and maintenance.” *Skelly v Skelly*, 286 Mich App 578, 582; 780 NW2d 368 (2009).

Additionally, the court properly considered defendant’s social security benefits when determining the division of property. In *Biondo v Biondo*, 291 Mich App 720, 727; 809 NW2d 397 (2011), this Court held that the lower court clearly erred when it ordered that the party’s social security benefits be “equalized.” In this case, the trial court did not divide defendant’s social security benefits between the two parties. In fact, the trial court specifically recognized that social security benefits cannot be attached and stated that its award was based solely on

defendant's pension. Rather, the court referenced that income when considering other factors, including "the necessities of the parties" and "general inquiries of equity." *Id.* at 729.

The facts brought out at the earlier hearings support the trial court's decision. The key factor was that plaintiff's house was paid for and she did not have a mortgage prior to the marriage, and she testified that the parties took out a mortgage to do some work on the house and to pay off defendant's debts. The effect of the judgment was to make defendant pay for the debt out of his assets, rather than to encumber plaintiff's assets with that liability. The lump sum awarded to plaintiff out of defendant's pension did not greatly exceed the amount of the mortgage debt outstanding. Where defendant failed to cooperate with his attorney, and did not appear for hearings in court, he contributed to any errors by the court.

Although the court misstated defendant's income at \$3,900, rather than \$2,900 per month, that misstatement did not enter into the amount awarded. In the same sentence, the court indicated that defendant's \$900 per month pension was 30% of his income, thus the court used the proper amount of income in its calculations. Defendant was \$6600 in arrears to the plaintiff at the time of the judgment and the trial court added this amount to three years of alimony at \$800 per month for the total amount of \$35,400.

While defendant argues that the court did not consider defendant's situation and the effect that the property distribution would have on him, defendant did not attend the trial. This court will not second-guess the trial court in this situation. *Musico*, 62 Mich App at 170. There is no reason for this Court to have a definite and firm conviction that a mistake has been committed by the trial court. *Beason*, 435 Mich at 805.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra