STATE OF MICHIGAN

COURT OF APPEALS

KARI L. LANG,

Plaintiff-Appellee,

V

JOHN P. LANG,

Defendant-Appellant.

UNPUBLISHED
May 14, 2020

No. 347110
Wayne Circuit Court
Family Division
LC No. 18-102826-DO

Before: JANSEN, P.J., and METER and CAMERON, JJ.

PER CURIAM.

Defendant appeals as of right from the judgment of divorce awarding spousal support and attorney fees to plaintiff. We affirm.

I. BACKGROUND

Plaintiff filed for divorce after 29 years of marriage. The parties scheduled a mediation session, which defendant did not attend. Defendant wrote plaintiff a letter requesting reconciliation. Plaintiff filed a motion to compel the sale of the marital home, which defendant opposed. The trial court ordered defendant to negotiate in good faith at a rescheduled mediation session, and for the marital home to be listed for sale if a settlement agreement was not reached. Defendant attended the court-ordered mediation session, but refused to enter into a settlement agreement because he did not want a divorce. The case went to trial.

Plaintiff testified that she had been a stay-at-home mother and had not earned any income for 27 years. All family expenses were paid from defendant's income. Plaintiff had chronic back pain that prevented her from sitting or standing for lengthy periods. Accordingly, plaintiff requested spousal support because she did not believe she would be able to work. Plaintiff also requested an award of attorney fees because defendant failed to negotiate in good faith at mediation and interfered with the sale of the marital home.

Defendant testified that he had rejected three offers for the marital home because the parties' realtor had listed the home as being 285 square feet larger than it actually was. Defendant

rejected the first offer of $270,000. A second offer of $287,000 was made. Defendant called the second offeror's real estate agent to inform him of the discrepancy. The second offeror made another offer of $278,700, and defendant made a counteroffer of $290,000. Plaintiff had been willing to accept all three offers. Defendant admitted that he had not settled the case because he did not want a divorce.

The trial court awarded plaintiff spousal support of $2,910 per month. Plaintiff was granted exclusive authority to accept any offer of at least $278,000 for the marital home, the proceeds of which would be distributed in equal shares. Each party retained their vehicles and personalty. The parties were awarded equal shares of the marital assets—approximately $830,000 per share. The trial court also awarded plaintiff $8,000 in attorney fees. Defendant now appeals.

II. SPOUSAL SUPPORT

Defendant argues that the trial court abused its discretion in awarding plaintiff spousal support because (1) the evidence did not establish that plaintiff was unable to work, (2) plaintiff was awarded substantial assets she could use to support herself, and (3) the trial court relied on a computer program rather than legal analysis when it calculated the award. We disagree.

"Whether to award spousal support is in the trial court's discretion, and the trial court's decision regarding spousal support must be affirmed unless we are firmly convinced that it was inequitable." *Richards v Richards*, 310 Mich App 683, 690; 874 NW2d 704 (2015) (quotation marks and citation omitted). "This Court reviews underlying findings of fact for clear error." *Id*. "A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made." *Id*. (quotation marks and citation omitted.) "[R]egard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

"The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case." *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336 (2008). A trial court should consider:

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).]

In this case, the trial court made findings as to each of the factors except for fault in causing the divorce. The court found that the parties had been physically and emotionally estranged for years, but they had "maintain[ed] the financial status quo throughout the entire marriage." Plaintiff had been a stay-at-home mother for 27 years of the 29-year marriage. She had no education,

training, career experience, or marketable skills, "[a]nd her back issues do not make her very marketable." Defendant, on the other hand, had maintained gainful employment at the same job for 30 years, despite his hemorrhoids. Marital property would be equally divided. Defendant was 54 years old, while plaintiff was 51 years old. Defendant had "a clear ability to pay support," while plaintiff did not. The parties' living situation had been the same throughout the duration of the marriage: "Defendant worked, plaintiff stayed home, and they shared the marital income for bills [and] living expenses . . . ." Plaintiff would need support due to her limited work experience and chronic pain; defendant would not. Both parties had health issues, but defendant's hemorrhoids did not affect his earning capacity. Throughout the marriage, plaintiff had been responsible for caring for the parties' three children, while defendant had been responsible for the financial support. Therefore, the trial court found, "[b]oth parties have contributed in different ways . . . to maintaining this household," and it was "only equitable to divide . . . the entire estate down the middle."

The trial court's findings were not clearly erroneous. Defendant cites no authority for the proposition that, to receive spousal support, a payee spouse must provide medical evidence that she or he is disabled under any particular definition of disability. Plaintiff testified that she had no education or training beyond high school. She had not worked in 27 years. Her chronic pain prevented her from sitting or standing for long periods, and she had to take breaks every 30 minutes while performing household tasks. Defendant did not produce any evidence to refute plaintiff's testimony regarding her chronic pain or earning capacity. This Court defers to the trial court's special opportunity to judge the credibility of witnesses. *Cassidy v Cassidy*, 318 Mich App 463, 477; 899 NW2d 65 (2017). Therefore, defendant's argument that plaintiff failed to establish her disability under a formal or medical definition is inapposite to whether the spousal support award was appropriate.

Defendant's argument that plaintiff is capable of supporting herself from the substantial marital assets she was awarded is also inapposite. This Court has held that "where both parties are awarded substantial assets, the court, in evaluating a claim for [spousal support], should focus on the income-earning potential of the assets and should not evaluate a party's ability to provide self-support by including in the amount available for support the value of the assets themselves." *Gates v Gates*, 256 Mich App 420, 436; 664 NW2d 231 (2003) (quotation marks and citation omitted; alteration in original). Therefore, the amount of marital property awarded to plaintiff has no bearing on whether the spousal support award is appropriate.

Lastly, defendant argues that the trial court abused its discretion by relying on a prognosticator program to calculate the amount of the award. Defendant points to *Myland v Myland*, 290 Mich App 691, 695-696; 804 NW2d 124 (2010), in which the trial court multiplied the difference in the parties' imputed incomes by 0.25 because the parties had been married for 25 years. This Court held:

> This limited, arbitrary, and formulaic approach is without any support in the law. It totally fails to consider the unique circumstances of the parties' respective positions and fails to reach an outcome that balances the parties' needs and incomes. In short, we cannot sanction the use of such a blunt tool in any spousal support determination, and the trial court's use of this formula here was an error of law. [*Id*. at 696.]

Unlike *Myland*, the trial court did not use an arbitrary formula in this case. The parties themselves used a prognosticator program to calculate their proposed spousal support awards. Defense counsel calculated defendant's proposed obligation by removing the bonuses he had received every year for the past three years from his expected income, and by imputing a $30,000 annual income to plaintiff, without any factual basis for that estimate. Plaintiff's counsel calculated her proposed award by imputing $93,000 to defendant, which represented his average income over the last three years, and $0 to plaintiff, which represented her actual income over the last 27 years. The trial court imputed $90,000 to defendant to account for potential reductions in his quarterly bonuses, and $0 to plaintiff. The trial court did not simply multiply defendant's income by an arbitrary number that it arrived at independent of the spousal support factors. Rather, the trial court considered the parties' financial status quo and their respective needs and earning capacities. It made findings as to each of the spousal support factors, which, as discussed above, were not clearly erroneous. It imputed incomes to the parties on the basis of those factors and applied the same formulas the parties had applied in calculating their proposed awards. Therefore, the trial court did not abuse its discretion in awarding plaintiff $2,910 per month in spousal support.

III. ATTORNEY FEES

Defendant argues that the trial court abused its discretion in awarding plaintiff $8,000 in attorney fees because (1) plaintiff could have paid the fees out of the substantial property she was awarded, and (2) defendant, by simply exercising his right to go to trial, did not needlessly prolong the proceedings in violation of a court order. We disagree.

"Any findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error . . . ." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). "The determination of the reasonableness of an attorney fee award is within the trial court's discretion and is reviewed for an abuse of discretion." *Butler v Simmons-Butler*, 308 Mich App 195, 210; 863 NW2d 677 (2014). "An abuse of discretion occurs . . . when the result is outside the range of reasonable and principled outcomes." *Id*. at 223.

"[A] trial court may require a party 'to pay any sums necessary to enable the adverse party to carry on or defend the action . . . .' " *Cassidy*, 318 Mich App at 480, quoting MCL 552.13(1). Similarly, MCR 3.206(D) provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that:
>
> > (a) the party is unable to bear the expense of the action, including the expense of engaging in discovery appropriate for the matter, and that the other party is able to pay, or
> >
> > (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply, or engaged in discovery practices in violation of these rules.

Plaintiff established that she was unable to bear the expense of the action. "[A] party sufficiently demonstrates an inability to pay attorney fees when that party's yearly income is less than the amount owed in attorney fees." *Myland*, 290 Mich App at 702. The trial court may use findings made in determining the necessity of spousal support to determine the necessity of awarding attorney fees. *Stackhouse v Stackhouse*, 193 Mich App 437, 441-442; 484 NW2d 723 (1992). Plaintiff had not earned any income from any source during the last 27 years of the marriage. Her $0 annual income was less than the approximately $10,000 she incurred in attorney fees. Defendant, who earned approximately $93,000 per year, was able to pay. Defendant argues that plaintiff could have paid her attorney fees from the property she was awarded in the divorce. However, "[a] party may not be required to invade her assets to satisfy attorney fees when she is relying on the same assets for her support." *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). Therefore, the trial court did not abuse its discretion in awarding plaintiff approximately $8,000 in attorney fees.

In addition, plaintiff established that a portion of her attorney fees were attributable to defendant's violation of a court order. Defendant argues that the attorney fee award impermissibly punished him for exercising his due process right to go to trial. However, defendant did not simply exercise his right to go to trial. The parties were scheduled for mediation on June 6, 2018. Defendant did not attend. Instead, he sent plaintiff a letter or offer of reconciliation. He would not cooperate with selling the marital home. Plaintiff filed a motion to compel the sale. The trial court ordered the parties to negotiate in good faith at a rescheduled mediation session and to list the marital home for sale if they were unable to reach a settlement agreement. Defendant attended the rescheduled mediation session but, by his own admission, refused to settle because he did not want a divorce.

As to the sale of the marital home, defendant told plaintiff, "[T]he judge said I had to put the house up for sale, but the judge did not tell me I had to [sell] the house." A few months prior to trial, defendant had learned that the home was actually 285 square feet smaller than he previously believed. He did not tell the parties' realtor at their first meeting: "It never came up, so I never said anything." He called the realtor to change the listing. A potential buyer made an offer of $270,000 but defendant rejected it because the realtor had not disclosed that the square footage was listed incorrectly. A second potential buyer made an offer of $287,000. Defendant called the offeror's realtor and asked if he was aware that the home was smaller than listed. The offeror made another offer of $278,700. Defendant "had an issue with the closing date because it was too close to trial." Plaintiff had been willing to accept all three offers.

This Court explained in *Richards*, 310 Mich App at 701, MCR 3.206(D)(2)(b)[1] was promulgated

> to (1) reduce the number of hearings that occur because of a litigant's vindictive or wrongful behavior, (2) shift the costs associated with wrongful conduct to the party engaging in the improper behavior, (3) remove the ability of a vindictive litigant to apply financial pressure to the opposing party, (4) create a financial incentive for

[1] When *Richards* was decided, the provisions in MCR 3.206(D) were contained in MCR 3.206(C).

attorneys to accept a wronged party as a client, and (5) foster respect for court orders.

The trial court did not award plaintiff attorney fees because defendant exercised his right to go to trial after failing, in good faith, to reach a settlement agreement. Instead, the trial court awarded plaintiff attorney fees because, in regard to both mediation and the sale of the marital home, defendant attempted to find loopholes in the trial court's order, rather than participating in good faith, as he was required to do. Therefore, the trial court did not abuse its discretion in awarding plaintiff attorney fees because defendant refused to comply with a court order, despite having the ability to comply. See *Safdar v Aziz*, 327 Mich App 252, 268; 933 NW2d 708 (2019).

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Thomas C. Cameron