

STATE OF MICHIGAN
COURT OF APPEALS

JOHN ALFRED HOHMAN, JR.,

Plaintiff-Appellant/Cross-Appellee,

v

BARBARA ANN HOHMAN,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
February 10, 2005

No. 250566
Lenawee Circuit Court
LC No. 03-026338-DM

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

Plaintiff appeals as of right, and defendant cross appeals, from a judgment of divorce. We affirm the judgment as modified, and remand for a determination of reasonable attorney fees.

Both parties challenge the trial court's property division. Plaintiff argues that the trial court erred by failing to divide the marital property equally and by refusing to allocate the marital debt or require defendant to pay part of the marital debt. Defendant argues that the trial court erred in refusing to expressly allocate the marital debt entirely to plaintiff.

In a divorce case, a trial court must make findings of fact and dispositional rulings. *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996). Findings of fact are reviewed for clear error. *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." *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). The reviewing court may not "substitute its judgment for that of the trial court; if the trial court's view of the evidence is plausible, the reviewing court may not reverse." *Id.*

"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." *Sparks, supra* at 151-152. Dispositional rulings such as the division of marital property "should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable." *Id.* at 152.

As noted by the parties, MCR 3.211(B)(3) provides that "[a] judgment of divorce . . . must include . . . a determination of the property rights of the parties." In this case, the judgment

contains a property division section allocating the assets and personal property of the parties, and addressing the parties' marital debt. Although the court repeatedly stated that it would not assign individual debts to one party or the other, the judgment contains a "determination" of debts and assets, including personal property, sufficient to satisfy the court rule.

The division of property in a divorce action is not governed by "strict mathematical formulations"; rather, "while the division need not be equal, it must be equitable" in light of all the facts. *Sparks, supra* at 158-159; see also *McDougal, supra* at 88.

[T]he following factors are to be considered wherever they are relevant to the circumstances of the particular case: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. *Sparks, supra* at 159-160; see also *Dart v Dart*, 460 Mich 573, 583; 597 NW2d 82 (1999).

The trial court found (1) that the parties had been married for fourteen years, (2) that both parties had made negative contributions to the marital estate, (3) that defendant was forty-four years old, and (4) that both parties were healthy. Concerning factor (5), the parties' life status, the court found that plaintiff was a probate judge, while defendant had been a homemaker during the marriage and her age limited her opportunities for a new career, although it was not too late to begin anew. Concerning factor (6), the necessities and circumstances of the parties, the court noted that the parties lived well and enjoyed a prestigious position in the community. With regard to factor (7), the court found that there was a great disparity in the earning abilities of the parties, although it hoped that defendant would obtain training and become successfully employed in the future. Concerning factor (8), the parties' past relations and conduct, the court found that plaintiff was at fault for the divorce, but that his misconduct was not as serious as the court had seen in other cases. Lastly, although the court did not specifically identify its findings concerning factor (9), general principles of equity, it found that defendant had good reason to believe that plaintiff was having an extramarital affair, that plaintiff controlled the couple's finances and was in large part responsible for their financial status, that plaintiff knew how to "rattle . . . defendant's chain" and "[s]ometimes did it very cruelly," and that defendant and the children had helped plaintiff achieve his dream of becoming a judge. Additionally, the court found that, after the divorce, plaintiff would continue to have his salary, his benefits, and his prestigious position in the community, while defendant would have some personal property, half of the parties' financial assets, and a job that paid very little, and would have to pay her own medical insurance and possibly child care expenses.

We believe that the trial court's decision to divide the parties' financial assets equally and to award plaintiff approximately seventy-six percent of the parties' personal property was fair and equitable in light of the circumstances, particularly the large disparity in the parties' incomes and earning abilities. Contrary to plaintiff's argument, the trial court did not rely on its finding of fault to justify its property division, and even noted that plaintiff's fault was relatively minor in comparison to other cases.

Plaintiff suggests that he should receive credit for contributing his salary during the marriage and the \$600,000 in stock that he received from his grandparents before the marriage. But the salary earned by plaintiff during the marriage is marital property, *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997), and plaintiff's financial contribution to the marriage is balanced by defendant's contributions as a mother and homemaker, and by her contribution toward plaintiff's achievement of his dream of becoming a judge. See *Hanaway v Hanaway*, 208 Mich App 278, 293; 527 NW2d 792 (1995); see also *Postema v Postema*, 189 Mich App 89, 94-107; 471 NW2d 912 (1991) (while rejecting the spousal support form of compensation, this Court found that the nonstudent spouse had an equitable claim for compensation for the "concerted family effort" expended toward the achievement of the husband's law degree as part of a long-range plan intended to benefit the family as a whole). Additionally, because plaintiff sold his stock to pay off debt incurred during the marriage, his stock became commingled with marital property. Cf. *Dart, supra* at 584-585 (separate property kept separate is not part of the marital estate). In any event, the stock fund had been fully depleted by the time of the divorce.

Concerning the approximate \$150,000 third mortgage owed to plaintiff's parents, which comprised approximately three-quarters of the marital debt remaining after the first and second mortgages were paid off, contrary to plaintiff's argument, the trial court did not find that the loan was in fact a gift. Although the court stated that it "suspect[ed]" that it would be "handled much different than a [regular] debt," it conceded that it did not know for certain whether plaintiff would have to repay the loan. Because plaintiff's parents did not testify, and because the home was already fully encumbered when this loan was made, the court left open the possibility that plaintiff's parents might forgive or defer payment of the debt. Additionally, the trial court's division of property was principally based on the relative needs and resources of the parties, not the debt owed to plaintiff's parents. Because the court assumed that plaintiff would be paying all the debts, the status of the loan from plaintiff's parents did not affect the property division.

Defendant argues that the hold-harmless provision in the judgment, which was inserted by plaintiff, is inconsistent with the trial court's findings, producing an inequitable result. We agree. As defendant correctly observes, the trial court repeatedly refused to allow plaintiff to insert other provisions allocating part of the marital debt to defendant or allowing plaintiff to set off all or part of his debt payments from his spousal support obligation. Nevertheless, a provision in the judgment drafted by plaintiff states:

Except as stated immediately above, each party is responsible for one half of the payments due on the debt listed herein and *shall assume, indemnify and hold the other party harmless from any liability for one-half (1/2) thereof.* [Emphasis added.]

This provision cannot be reconciled with the trial court's repeated rulings rejecting plaintiff's attempt to require defendant to pay part of the marital debt. Further, the provision is inequitable in light of the facts of this case—particularly the great disparity in the income and earning abilities of the parties, and the fact that the amount of spousal support was determined based on the assumption that plaintiff would pay all of the marital debt. Accordingly, we direct that this provision be stricken from the judgment of divorce.

We also agree that the trial court erred by refusing to specifically order that plaintiff was responsible for paying the marital debt. The trial court repeatedly found that both parties had helped incur the marital debt, but that defendant would have no resources to pay any portion of the debt. Because of potential political repercussions to plaintiff from failing to pay his debts or filing for bankruptcy, the trial court assumed that plaintiff would pay the entire marital debt, which was in his name, and based its award of spousal support on that assumption. But the court declined to explicitly hold plaintiff responsible for the marital debt, thereby enhancing defendant's potential liability for the debt, or risking her spousal support through plaintiff's attempts to set off her alleged (and unspecified) share of the debt from his spousal support obligation. This is inequitable, given that the trial court explicitly recognized that defendant "should receive more" spousal support, yet declined to order more because it assumed that plaintiff would be paying the entire marital debt. We therefore direct that the judgment of divorce be modified to explicitly allocate all of the marital debt to plaintiff.

We reject plaintiff's request that alimony be reduced based on his paying the entire marital debt. "A divorce court has the discretion to award alimony as it considers just and reasonable." *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996); see also *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003). "The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party, and alimony is to be based on what is just and reasonable under the circumstances of the case." *Id.* at 631; *Magee, supra* at 162.

Among the factors that should be considered are: (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, supra* at 631.

"The trial court should make specific findings of fact regarding those factors that are relevant to the particular case." *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993).

In the present case, the trial court considered the parties' incomes, the division of assets and personal property, and its assumption that plaintiff would pay all of the marital debt. The trial court observed that spousal support of \$1,500 a month would be the equivalent of \$18,000 a year, and \$90,000 after five years, which was about two-thirds of plaintiff's gross annual salary, while plaintiff would retain gross earnings of \$122,000 a year. Assuming that defendant continued to earn approximately \$7,000 a year, an award of \$18,000 a year in spousal support would produce a yearly income for plaintiff of approximately \$25,000, reduced to \$20,000 after paying for health insurance, which was approximately a sixth of plaintiff's annual income. The court ordered plaintiff to pay spousal support, upon the sale of the marital home, in the amount of \$2,000 a month for the first year and \$1,500 a month for four years thereafter, or until either party's death or defendant's remarriage. Plaintiff's spousal support payments are tax deductible.

A reduction or elimination of the award of spousal support to compensate plaintiff for paying the parties' debts would be inequitable, particularly considering that the trial court admittedly set a lower amount of spousal support in the first instance based on the assumption that plaintiff would be paying all of the marital debt. Further, doing so would impoverish defendant while leaving plaintiff with a comfortable standard of living and a prestigious position in the community that defendant helped him achieve.

On cross appeal, defendant argues that the trial court erred in limiting spousal support to five years because spousal support must be non-modifiable. MCL 552.28 provides that a judgment for spousal support can be modified to make any provision that the trial court "might have made in the original action." In *Gates v Gates*, 256 Mich App 420, 433; 664 NW2d 231 (2003), this Court held that, where an award of spousal support results from an adjudication rather than from the parties' agreement, it may not be interpreted as being nonmodifiable even if contains a provision purporting to limit its duration. That is precisely the situation here, where the judgment states that, after five years, spousal support "shall terminate and be forever barred." As conceded by plaintiff, under MCL 552.28, either party can seek to modify the spousal support award despite its language stating otherwise. *Id.* at 433-434. The judgment shall be amended on remand.

Defendant argues that, by forcing her to seek a modification in order to receive continued support after five years, the judgment erroneously changes the statutory burden of proof. We disagree. *Gates, supra* at 434-435. Defendant will bear the burden of proof only if she seeks to have the award modified. *Id.* at 434-435. Plaintiff will bear the burden of proof if he seeks to modify the award. That is consonant with the terms of the statute.

Lastly, defendant argues that the trial court abused its discretion by failing to order plaintiff to pay her attorney fees, including those incurred on appeal.

A trial court's decision whether to award attorney fees in a divorce case is reviewed for an abuse of discretion. *Gates, supra* at 437-438. "A party in a domestic relations matter who is unable to bear the expense of attorney fees may recover reasonable attorney fees if the other party is able to pay." *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999); see also MCR 3.206(C) and MCL 552.13. "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); see also *Hanaway, supra* at 298-299. "Attorney fees also may be authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation." *Hanaway, supra* at 298; see also *Schoensee v Bennett*, 228 Mich App 305, 315; 577 NW2d 915 (1998).

In the present case, defendant filed a motion for attorney fees on November 4, 2002, indicating that she had no resources and that plaintiff had agreed to pay the same. In his response, plaintiff claimed that he had no resources either and that he had been "rebuffed" when he "attempted to negotiate payment of defendant's attorney fees with defendant's attorney." On November 26, 2002, the trial court indicated that, because there had been no evidence concerning the amount of attorney fees, it could not yet consider the issue. However, the court indicated that it would "[c]ertainly . . . order attorney fees in a reasonable amount." On March 6, 2003, the trial court entered an order that, inter alia, required plaintiff to pay \$2,500 to

defendant's then-counsel "as partial and temporary attorney fees on behalf of Defendant-mother." However, the issue was not addressed again. Because the trial court recognized defendant's entitlement to reasonable attorney fees, we remand to allow defendant to file an appropriate motion requesting reasonable trial and appellate attorney fees.

Affirmed in part as modified, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Helene N. White