STATE OF MICHIGAN

COURT OF APPEALS

TARRELL ALBERT HAGEN,

Plaintiff-Appellee,

v

KIMBERLY JONES-HAGEN,

Defendant-Appellant.

UNPUBLISHED
April 3, 2008

No. 270930
Wayne Circuit Court
Family Division
LC No. 04-403829-DO

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from the bench trial judgment of divorce entered on June 8, 2006. Defendant challenges the award of spousal support, the division of property, and the failure of the trial court to award her attorney fees. We affirm but remand for administrative correction of the divorce judgment to reflect that the award of spousal support is modifiable.

The trial court awarded defendant $1,000 per month in spousal support for two-and-a-half years and ordered plaintiff to pay the premiums to continue defendant's health insurance coverage for three years. The award of spousal support was designated "nonmodifiable." The trial court based the award on the parties' current incomes, their lack of assets, and the amount of debt accrued during the marriage. We review a trial court's determination regarding spousal support for an abuse of discretion. *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003). We review a trial court's factual findings in relation to an award of spousal support for clear error. *Id.* at 629. When the trial court's factual findings comport with the evidence, "this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts. The trial court's decision regarding alimony must be affirmed unless the appellate court is firmly convinced that it was inequitable." *Id.*, citing *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

The purpose of spousal support "is to balance the incomes and 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). Spousal support must "be based on what is just and reasonable under the circumstances of the case." *Olson*, *supra* at 631; MCL 552.13. In determining the amount of spousal support, the court should consider "the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health and fault, if any, and all

other circumstances of the case." *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996).

Plaintiff and defendant were married for seven years when they separated and were married for nine-and-a-half years when the judgment of divorce was finally entered. They are currently both in their mid-40s. Plaintiff earns $96,000 per year at General Motors. Plaintiff and defendant amassed significant debt during the marriage and plaintiff accepted the burden of that debt in the divorce and his Chapter 13 Bankruptcy proceedings. Plaintiff pays $750 in child support, $1,000 in spousal support, $368 for defendant's health insurance premiums, and $2,200 on his Chapter 13 repayment plan in addition to the outstanding debt on the furniture purchased for the Farmington Hills house, the fine owed to the Farmington Hills library, and his current monthly bills for utilities, car insurance, food and other necessities. Defendant asserted that a physician had placed her on medical leave and that she was dependent on pain medication for chronic back pain. Defendant presented no evidence in the trial court that she had been placed on medical leave from work, and attempted to improperly expand the record on appeal to establish this fact. We may not consider that evidence. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Defendant was able to attend nursing school despite her alleged disability. Moreover, defendant continues to assert that she would work if plaintiff paid the remainder of her tuition at Wayne State University.

We agree with the trial court that defendant is not entitled to spousal support for the rest of her life. The parties lived together for only seven years and had no children together. Defendant stated on the record that she was not a housewife and had no one to care for in the home. Rather, defendant worked and took care of herself since the age of 16. Defendant owned her own home and raised her two children alone before she married defendant. If defendant were an older mother and wife with little possibility of finding employment, she would need spousal support for the rest of her life. See *McNamara v McNamara*, 178 Mich App 382, 389-390; 443 NW2d 511 (1989) (finding award of spousal support for life was appropriate when plaintiff spent her adult life working as a homemaker and mother and had little chance of finding a career to sustain her financially at the age of 50). The two-and-a-half year limit was appropriate, however, to allow defendant to finish school and/or find a job. Accordingly, we find that the trial court's factual findings relevant to the award of spousal support were based on the evidence. Given the parties' financial condition at the time of their separation and divorce, the amount of spousal support was fair and equitable.

Defendant also contends that the award of spousal support should be modifiable. There are two types of spousal support, periodic alimony and alimony in gross. *Staple v Staple*, 241 Mich App 562, 566; 616 NW2d 219 (2000). Generally, periodic alimony may be modified upon a party's petition when there is a change in circumstances. MCL 552.28. Historically, periodic alimony was defined as follows:

> [I]f the installment payments are subject to any contingency, such as death or remarriage of a spouse, courts adhering to the bright-line approach hold that the payments are more in the nature of maintenance payments . . . . [*Staple*, *supra* at 566.]

Alimony in gross is exempt from MCL 552.28 and is, therefore, nonmodifiable. Alimony in gross has been defined as follows:

> If the alimony is either a lump sum or a definite sum to be paid in installments, the alimony provision is classified as alimony in gross. This term is somewhat misleading, because 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. [*Staple*, *supra* at 566.]

In recent years, this Court adopted a modified approach to allow parties to render even an award of periodic alimony nonmodifiable. Parties to a divorce action may clearly express their intent to render periodic alimony nonmodifiable. *Staple*, *supra* at 568. In doing so, the parties must agree to waive their statutory right to seek modification of the award and include that agreement in the judgment of divorce. *Id.* There are no "magic words" to waive this right. However, the parties' agreement or the reasons for the court's ruling "should be clearly and unequivocally expressed upon the record" and in the judgment of divorce. *Id.* at 580-581.

The current spousal support award is for periodic alimony. The payments come from plaintiff's monthly salary and are intended to sustain defendant while she finishes school and/or finds employment. The payments will be discontinued in the event of defendant's death or remarriage. There was no record discussion regarding the modifiability of the spousal support award. There is no indication that any one explained to defendant the effect of making the spousal support award nonmodifiable. Moreover, there is no indication that she agreed to that provision. In fact, defendant did not sign the judgment of divorce and specifically stated her intent to appeal the judgment. Given that defendant did not waive her statutory right to seek modification of the spousal support award, we remand to the trial court for administrative correction of the divorce judgment to reflect that the award of spousal support is modifiable.

Defendant also challenges the trial court's division of the marital property on several grounds. The division of marital property is within the trial court's discretion. When the trial court's findings of fact are not clearly erroneous, we must affirm unless we is left with the firm conviction that the division was inequitable. *Sparks*, *supra* at 151-152; *Gates v Gates*, 256 Mich App 420, 422-423; 664 NW2d 231 (2003). The goal of property division in a divorce proceeding "is to reach an equitable distribution of property in light of all the circumstances." *Gates*, *supra* at 423. The trial court is not required to determine the value of the property with mathematical certainty and give each party exactly 50 percent. However, the trial court must clearly explain its reasoning if it varies too far from an equal division. *Id.* The Michigan Supreme Court outlined the following nonexhaustive list of factors to consider in dividing marital property:

> (1) [D]uration 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. There may even be additional factors that are relevant to a particular case. For example, the court may choose to consider the interruption of the personal career or education of either party. The determination of relevant factors will vary depending on the facts and circumstances of the case. [*Sparks*, *supra* at 159.]

First, defendant incorrectly contends that the trial court awarded both of the parties' houses to plaintiff. The couple had $60,000 equity in their Farmington Hills house. Regardless

of whether defendant was at fault, the couple was unable to sell the Farmington Hills house before the close of the foreclosure proceedings. The couple was unable to recoup any equity in that property. Plaintiff and defendant refinanced their Detroit house and took a second mortgage against the property. As a result, the value of the house was less than the debt against it. The Detroit house had not been foreclosed because it was protected under plaintiff's bankruptcy plan. Plaintiff made payments against the mortgage debt through the Chapter 13 structured repayment plan. Defendant, on the other hand, had no income and no way to make the mortgage payments. Therefore, the house would have eventually been foreclosed upon had it been awarded to defendant. Defendant also claims that the trial court improperly accepted an appraisal report from a noncertified home appraiser. However, the record does not support defendant's claim.

Defendant contends that the court should have calculated a value for plaintiff's General Motors stock options earned from 1998 through 2003. It appears from the record that plaintiff had not exercised his earned stock options because they did not fully vest until 2008 through 2014, depending on when the option was earned. Accordingly, the trial court was unable to calculate the value of the stock options on June 8, 2006, and still could not today.

Although defendant claims the trial court erred in not awarding her half the amount of the parties' 2003 tax refund. Although plaintiff admitted that he signed defendant's signature on the 2003 tax refund check, he testified that he "used that money to sustain our livelihood through the March '04 period. "[Plaintiff] indicated . . . that [he] was still giving [defendant] money, paying bills on the Farmington house," and specifically testified that he paid the "[m]ortgage, light bill, gas bill, car payments up to February '04."[1] Defendant did not challenge this testimony during her cross-examination of plaintiff or produce any evidence that suggested plaintiff used the proceeds of the 2003 tax refund other than for the parties' mutual obligations. We cannot conclude the trial court clearly erred in not awarding plaintiff half the amount of the 2003 tax refund check. Further, a dispositional ruling "should be affirmed unless the appellate court is left with the firm conviction that [it] was inequitable." *Sparks, supra* at 152. The failure to award half the amount of a tax refund check does not render the entire dispositional ruling inequitable. Accordingly, reversal is not required in this regard.

We disagree with defendant's claim that the trial court erroneously calculated her portion of certain insurance proceeds. At trial, defendant presented only two insurance proceeds checks, one for $3,200 and the other for $1,700, with a total value of $4,900. The trial court awarded defendant $2,200, $50 less than half the value of those checks. Absent any evidence that checks for larger amounts were issued, the trial court had no basis to award those amounts to defendant. Although not divided exactly in half, the award for the insurance proceeds was within the court's discretion because it did not vary too far from an equal division. See *Gates*, *supra* at 423.

Defendant has repeatedly challenged the award of vehicles to the parties, claiming that she was entitled to an operable vehicle. Prior to their separation, plaintiff made the $600 monthly lease payments on defendant's 2003 Cadillac Escalade. In his bankruptcy proceedings,

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[1] The record is silent as to when the 2003 tax refund was cashed.

plaintiff released his rights and obligations to the Escalade. Thereafter, defendant was informed that she was responsible for the lease payments. Defendant was instructed to surrender the vehicle if she could not make the payments. Defendant kept the Escalade until it was repossessed and never made a payment. Further, defendant never presented any evidence that the vehicle was inoperable or could not be repaired. Each party was awarded a vehicle that they owned free and clear and defendant is not entitled to a new vehicle at plaintiff's expense.

Finally, defendant contends that plaintiff fraudulently transferred stocks in order to hide those assets from the trial court. However, once again, defendant has improperly expanded the record on appeal. See *Sherman*, *supra* at 56. Absent any evidence on this basis, the trial court had no grounds to find that plaintiff attempted to hide assets.

Defendant also challenges the trial court's denial of her request for attorney fees. Defendant requested attorney fees early in the proceedings, arguing that she could not afford to pay retained counsel. The hearing on defendant's motion was adjourned three times and defense counsel withdrew before the matter could be resolved. Thereafter, the court denied defendant's motion for attorney fees. Although defendant later commented that she had retained two or four separate attorneys to represent her in these proceedings, no other attorney ever filed an appearance before the trial court. Accordingly, defendant was not entitled to attorney fees in the final judgment of divorce. No party representing him or herself, even a party who is a licensed attorney, is entitled to attorney fees. *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423, 432; 733 NW2d 380 (2007); *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 726; 591 NW2d 676 (1998).

Affirmed, but remanded for administrative correction of the divorce judgment to reflect that the award of spousal support is modifiable. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Brian K. Zahra

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

TARRELL ALBERT HAGEN, Plaintiff-Appellee,	UNPUBLISHED April 3, 2008
v	No. 270930 Wayne Circuit Court Family Division
KIMBERLY JONES-HAGEN, Defendant-Appellant.	LC No. 04-403829-DO

Before: Whitbeck, C.J., and White and Zahra, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I agree with the majority that remand is necessary regarding spousal support to make the award modifiable. I also agree with the majority's affirmance of the trial court's award of spousal support.[1]

I disagree with the majority regarding attorney fees. I note that plaintiff filed for divorce in February 2004 and the proceedings below continued until June 2007. With the exception of two months early on in the proceedings, defendant proceeded below in propria persona and does so on appeal as well. The record supports that defendant could not afford to retain other counsel, yet her request for attorney fees to pay counsel during the several months during which she had representation below was denied. I would instruct the trial court on remand to award defendant whatever attorney fees she incurred, and an amount sufficient to gain representation on remand.

[1] I note, however, that the record does support that defendant suffers from chronic back pain and is on pain medication. Defendant, representing herself, early on in the proceedings stated to the court that she took pain medication daily, and had a bad back. The court asked defendant to explain to plaintiff's counsel off the record what her diagnosis was. The record reflects that defendant and plaintiff's counsel went out in the hallway, and plaintiff's counsel then stated on the record that defendant had shown her proof of an upcoming surgery. Defendant also stated to the court in a later proceeding, as did one of her witnesses, William Vaughn, that shortly before the Farmington Hills home was foreclosed on, she had been hospitalized for a number of days. Defendant's daughter testified that defendant had a bad back and she provided her with pain medication frequently.

I do not agree with the majority that the trial court properly denied defendant one half of the 2003 tax refund. Plaintiff made no showing in the trial court that he had even received the 2003 refund early enough so that he could apply it to pay marital bills through February 2004. The majority notes in a footnote that the record is silent as to when the 2003 tax refund was cashed, yet relies on plaintiff's testimony that he used the refund to pay marital bills, alone, to affirm the trial court, stating that defendant did not challenge this testimony during her cross-examination, when defendant did in fact challenge plaintiff whether he paid the bills. Defendant, representing herself, showed plaintiff various bills that evidence that he had not paid the marital bills through February 04. Defendant obviously did not know the method by which documents are offered and admitted into evidence.[2] A fair reading of the record does not adequately support that plaintiff applied the 2003 tax refund to pay marital bills through February 2004.

Finally, I note that the divorce judgment awards defendant one half of the 2004 and 2005 tax refunds, to which plaintiff admitted forging defendant's signature. The record supports that plaintiff refused to turn over those tax returns. Defendant should file a post-judgment motion in the trial court to compel plaintiff to produce the tax returns and to enforce the judgment as to those two refunds.

/s/ Helene N. White

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[2] The record is replete with instances evidencing that defendant's representing herself permeated and damaged her case below. Nonetheless, the majority makes little allowance for defendant's having proceeded in propria persona. See e.g., *Burton v Jones*, 321 F3d 569, 573 (CA 6, 2003) (pleadings of petitioner appearing in propria persona are held to less stringent standards than those drafted by attorneys), and *Wimberly v Rogers*, 557 F2d 671 (CA 9, 1977) (Court of Appeals should make all allowances possible in favor of persons appealing in propria persona).