

STATE OF MICHIGAN
COURT OF APPEALS

JODY KEVIN HARWOOD,

Plaintiff-Appellee,

v

POLLY FAYE HARWOOD,

Defendant-Appellant.

UNPUBLISHED

June 20, 2013

No. 309348

Wayne Circuit Court

LC No. 06-625056-DO

Before: JANSEN, P.J., and CAVANAGH and MARKEY, JJ.

PER CURIAM.

Defendant appeals as of right from a circuit court order denying her request for attorney fees. We affirm in part, reverse in part, and remand.

Plaintiff and defendant were divorced in 2007. They have been involved in numerous postjudgment proceedings since then, most relating to plaintiff's failure to comply with the judgment of divorce and other orders. In late 2011 and early 2012, the trial court held various hearings related to plaintiff's motion to modify his spousal support obligation, defendant's motions regarding plaintiff's noncompliance with various orders, and this Court's remand order in a prior appeal.¹ In March 2012, the trial court denied defendant's request for attorney fees and this appeal followed.

The trial court's decision whether to award attorney fees is reviewed for an abuse of discretion, but its findings of fact are reviewed for clear error, and any questions of law are reviewed de novo. *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012).

Attorney fees in a divorce action are not recoverable as of right. *Kurz v Kurz*, 178 Mich App 284, 297; 443 NW2d 782 (1989). They may be awarded in certain circumstances as provided in MCL 3.206(C). "The party requesting the attorney fees has the burden of showing facts sufficient to justify the award." *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010).

¹ *Harwood v Harwood*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2011 (Docket No. 300558).

An award of attorney fees is authorized when one party is unable to bear the expenses of the action or a specific proceeding in the action and the other party has the ability to pay. MCR 3.206(C)(1) and (2)(a). An award of attorney fees is also authorized when the fees are incurred “because the other party refused to comply with a previous court order, despite having the ability to comply.” MCR 3.206(C)(1) and (2)(b). In this case, defendant did not specifically request attorney fees in connection with the late 2011 and early 2012 hearings, or show facts justifying an award of fees under subrule (C)(2)(a) or (b). Defendant’s representations regarding her lack of funds to pay even basic expenses demonstrated the need for attorney fees, but defendant did not show that plaintiff had the ability to pay. The parties’ representations to the court indicated that both were equally impoverished. Further, although the record showed that plaintiff had failed to comply with various court orders throughout the proceedings, defendant did not show that plaintiff had the ability to comply with any particular order. Therefore, the trial court did not abuse its discretion in denying defendant’s request to the extent defendant sought attorney fees in connection with the 2011 and 2012 hearings.

We note that while defendant did not specifically request attorney fees in connection with the late 2011 and early 2012 hearings, she did ask the court to rule on prior requests for attorney fees that had been reserved. While the trial court correctly noted that it had not reserved the issue of fees “every single time,” it erred to the extent that it found that it had never reserved the issue. The record discloses that the court “reserved” the issue in January 2011 in connection with defendant’s December 2010 motions based on plaintiff’s failure to pay support and effectuate the division of pension assets through entry of a QDRO. It also “preserved” the issue in February 2011 in connection with defendant’s January 2011 motion based on plaintiff’s failure to pay \$12,500 as ordered. Because the record discloses that the trial court expressly reserved the issue of attorney fees related to prior proceedings and then failed to address the issue later, we remand to allow defendant to renew her request for and demonstrate a right to attorney fees under MCR 3.206(C) in connection with prior proceedings in which the issue was reserved.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Jane E. Markey