

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DIANA LYNNE KOCH,

Plaintiff/Cross-Defendant-Appellee,

v

ERIC CHARLES KOCH,

Defendant/Cross-Plaintiff-  
Appellant.

UNPUBLISHED  
July 18, 2017

No. 333020  
Saginaw Circuit Court  
LC No. 14-024894-DO

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

PER CURIAM.

Defendant appeals by right a judgment of divorce that awarded plaintiff 55% of defendant's gross monthly pension benefits and required defendant to pay a portion of plaintiff's attorney fees. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The parties were married in 1987 and lived as husband and wife until October 17, 2014. They had one child, Hunter Koch, who was an adult at the time of the parties' separation. In 2014, plaintiff filed a complaint for separate maintenance. Defendant responded with a counterclaim for divorce. Following a bench trial, the trial court entered the judgment of divorce. Plaintiff was 54 years old; defendant was 55.

At trial, plaintiff testified that she had been employed in the St. Charles School District for 22 years, where she worked in the kitchen for five-and-a-quarter hours per day and earned a gross annual income of roughly \$15,000. She testified that she has a high school diploma and a cosmetology license, although she has not used the license for 28 years. Defendant testified that he retired from the Pipefitters Union in June of 2007 due to multiple work-related surgeries and that he thereafter had an annual income of \$51,880.00 paid from his pension benefits.

Plaintiff testified that defendant and her father had a long-standing history of disagreement and conflict. According to plaintiff, her father was charged and convicted for an act of domestic violence against defendant in 2002. Plaintiff further testified that defendant had given her a bloody nose twice, and had hit her several times during the marriage, sometimes leaving bruises. Plaintiff stated that during the marriage defendant had demeaned her by telling

her that she was dumb, stupid, and an idiot. Plaintiff also testified that defendant threatened throughout the marriage to “beat the crap” out of her. She stated that defendant had an alcohol problem and would become “more aggressive” when intoxicated. Defendant testified that the incident with plaintiff’s father was something that “weighed heavily” on their marriage. Defendant admitted to having given plaintiff a bloody nose once with a car door.

On the day of their separation, the parties argued and, according to plaintiff, defendant started talking about her father and threatened to shoot plaintiff and her parents. Plaintiff testified that defendant then struck her twice, at least once in the face. After being struck the second time, plaintiff ran to a neighbor’s house where they called the police. Defendant admitted to drinking six bottles of beer on the day of the incident and admitted to striking plaintiff, stating that he hit plaintiff because she had started an argument that provoked him. Defendant stated that he was convicted on a charge of domestic violence arising from the incident, and had completed his probation for that conviction. Hunter testified that he had been living with his parents since birth and had never witnessed any domestic abuse incident between his parents. He stated that he had never seen any bruises on plaintiff and that plaintiff had not discussed with him any incidents of domestic violence on the part of defendant.

Plaintiff testified that she preferred separate maintenance to divorce because it would help the parties financially and allow for insurance. The trial court questioned defendant about his understanding of separate maintenance and divorce, but defendant maintained that he wanted a divorce and was willing to bear any extra cost associated with obtaining the divorce.

The court found that defendant was at fault for the breakdown of the parties’ marriage. Specifically, the court referred to the domestic abuse incident that led to the parties’ separation. The court also noted that during trial, defendant attempted to intimidate plaintiff by staring and making facial gestures at her. Further, defendant was the subject of several motions to comply with a conciliation order that required defendant to pay plaintiff a temporary spousal support of \$1,143 a month, and had objected to separate maintenance even if it would cost him more financially.

The court further held that spousal support was “clearly warranted in this matter based on plaintiff’s need for insurance and defendant’s “repeated failure to comply with the Orders regarding temporary spousal support,” reflecting “an ongoing obstructionist and obstinate attitude by defendant.” The judgment of divorce provided for the sale of the marital home with the proceeds to be split evenly, awarded spousal support to plaintiff in the amount of 55% of defendant’s monthly pension benefits, awarded plaintiff her own retirement benefits, and awarded attorney fees of \$5,000 to plaintiff based upon plaintiff’s needs and defendant’s misconduct and greater ability to pay. This appeal followed.

## II. STANDARD OF REVIEW

“In a divorce action, this Court reviews for clear error a trial court’s factual findings on the division of marital property and whether a particular asset qualifies as marital or separate property.” *Hodge v Parks*, 303 Mich App 552, 554-555; 844 NW2d 189 (2014). “Findings of facts are clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made.” *Id.* at 555 (quotation marks and citation omitted). This Court reviews

“whether a trial court’s dispositional rulings are fair and equitable in light of the trial court’s findings of fact, but this Court will reverse only if definitely and fairly convinced that the disposition is inequitable.” *Id.*

We generally review for an abuse of discretion a trial court’s decision whether to award attorney fees in a divorce action. *Richards v Richards*, 310 Mich App 683, 699; 874 NW2d 704 (2015). “An abuse of discretion occurs when the trial court’s decision falls outside the range of reasonable and principled outcomes.” *Woodington v Shokoohi*, 288 Mich App, 352, 355; 792 NW2d 63 (2010). Findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error. *Id.* at 699-700. Clear error exists when the Court is definitely and firmly convinced that a mistake has been made. *Id.* at 700.

### III. DETERMINATION OF FAULT

Defendant argues that the trial court erred by holding that defendant was at fault for the breakdown of the marriage and by giving undue weight to defendant’s fault in distributing the parties’ estate. We disagree.

The objective of distributing marital assets “is to reach an equitable distribution of property in light of all the circumstances.” *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003). “Although marital property need not be divided equally, it must be divided equitably in light of a court’s evaluation of the parties’ contributions, faults, and needs.” *Richards*, 310 Mich App at 694. “To reach an equitable division of marital property a trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each party’s station in life, each party’s earning ability, each party’s age, health and needs, fault or past misconduct, and any other equitable circumstance.” *Woodington*, 288 Mich App at 363. “The determination of relevant factors will vary with the circumstances of each case, and no one factor should be given undue weight.” *Id.* “The trial court should make specific factual findings regarding the factors that are relevant to the particular case.” *Korth v Korth*, 256 Mich App 286, 289; 662 NW2d 111 (2003). The trial court must not place excessive weight on the factor of fault. *McDougal v McDougal*, 451 Mich 80, 89-90; 545 NW2d 357 (1996). “[F]ault is an element in the search for an *equitable* division—it is not a punitive basis for an inequitable division.” *Id.* at 90. “In determining fault as one of the factors to be considered when fashioning property settlements, courts are to examine the conduct of the parties during the marriage.” *Welling v Welling*, 233 Mich App 708, 711; 592 NW2d 822 (1999) (quotation marks and citation omitted).

In this case, the trial court found that the divorce was the fault of defendant. Plaintiff testified to repeated acts of domestic violence during the marriage. Both parties admitted to defendant’s arrest and conviction for domestic violence in October 2014. Although Hunter testified that he was not aware of domestic violence in his parents’ home, Hunter was at school at the time of the October 17, 2014 incident and on the two prior occasions that defendant had bloodied plaintiff’s nose. The trial court noted that although Hunter testified that he had never witnessed any assaults or seen any bruises on plaintiff, none of the parties claimed that he was ever present during any of the incidents to which plaintiff testified, including the final incident in October 2014. The court also chose to credit plaintiff’s testimony regarding domestic violence over Hunter’s, noting that Hunter was living with defendant, who had called Hunter as a witness

and had claimed to be paying expenses for him. Judges sitting as a factfinder have the right to disregard all or part of the testimony of a witness. See *Phillips v Phillips*, 29 Mich App 127, 131; 185 NW2d 168 (1970). Further, the trial court has a superior ability to evaluate witness credibility, and this Court will not second-guess the trial court's witness credibility determinations. MCR 2.613(C).

Moreover, defendant admitted to having given plaintiff a bloody nose once with a car door and to hitting her during the October 2014 domestic violence incident. Indeed, defendant informed the court that he had completed his probation sentence with respect to the resulting conviction. Consequently, the record supports the trial court's findings concerning defendant's fault. Defendant argues that in assigning fault the court ignored the past conduct of plaintiff and her family. However, there is nothing in the record to suggest that the 2002 incident with plaintiff's father had anything to do with plaintiff or that plaintiff had requested her father to assault defendant. The trial court did not clearly err by holding that defendant was at fault for the breakdown of the marriage.

Although the trial court found that defendant was at fault, the property split was not predicated solely on fault, but on a number of factors the trial court considered to arrive at an equitable distribution of the marital estate. The trial court found, for example, that the parties had stipulated to plaintiff's list of assets and liabilities, with a few corrections regarding certain IRA accounts. The court noted that the parties were married for 27 years, and that both had contributed to the marital estate during the marriage. The court found that although defendant had health issues, some of his issues would be remedied with a scheduled knee surgery. Further, defendant had been the primary wage-earner in the marriage, but was retired and had an annual pension income of \$51,880. Plaintiff had been employed with the St. Charles School District for 22 years with an annual income of \$15,058. Plaintiff's itemized list of expenses did not include housing cost and health insurance cost. Finally, plaintiff's health insurance coverage was through defendant's employment, but because defendant insisted on a divorce rather than a judgment of separate maintenance, plaintiff would be required to spend an additional "\$400 to \$700" a month for health insurance.

In sum, the trial court did not give undue weight to defendant's fault but also considered a number of factors in disposing of the parties' estate. *McDougal*, 451 Mich at 89-90. We are not definitely and firmly convinced that the disposition was inequitable. *Parks*, 303 Mich App at 555.

#### IV. RETIREMENT BENEFITS

Defendant also argues that the trial court improperly invaded his separate estate by awarding 55% of his pension benefits to plaintiff where some part of it had accrued before the parties' marriage. We disagree and conclude that the trial court did not invade defendant's separate estate.

“A court’s jurisdiction in divorce matters is strictly statutory.” *Boonstra v Boonstra*, 209 Mich App 558, 561; 531 NW2d 777 (1995). MCL 552.18(1)<sup>1</sup> and MCL 552.101(3)<sup>2</sup> define the circuit court’s power to distribute pensions. *Id.* at 561-562. In discussing whether the court’s jurisdiction was limited to contributions made during the marriage, this Court stated:

[MCL 552.18(1)] does not expressly restrict the circuit court’s jurisdiction to pension contributions made within the confines of the marriage. Although that statutory provision provides that pension contributions made during the marriage must be considered, it does not expressly provide that contributions made before the marriage may not be considered. That is, the language is inclusive and mandates what *must* be taken into account, but does not expressly exclude consideration of other contributions. [*Boonstra*, 209 Mich App at 562.]

Further, in holding that pension benefits accrued before marriage may be the subject of a division of property, this Court adopted the following rationale:

The major consideration is the security of the family and the court may utilize any property in the real and personal estate of either party to achieve suitable support for the family as the court considers just and reasonable after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case. [*Booth v Booth*, 194 Mich App 284, 290; 486 NW2d 116 (1992) (quotation marks and citation omitted), see also *Pickering v Pickering*, 268 Mich App 1, 9; 706 NW2d 835 (2005).]

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<sup>1</sup> MCL 552.18(1) provides as follows:

Any rights in and to vested pension, annuity, or retirement benefits, or accumulated contributions in any pension, annuity, or retirement system, payable to or on behalf of a party on account of service credit accrued by the party during marriage shall be considered part of the marital estate subject to award by the court under this chapter.

<sup>2</sup> MCL 552.101(3) provides as follows:

Each judgment of divorce or judgment of separate maintenance shall determine all rights, including any contingent rights, of the husband and wife in and to all of the following:

- (a) Any vested pension, annuity, or retirement benefits.
- (b) Any accumulated contributions in any pension, annuity, or retirement system.
- (c) In accordance with section 18 of 1846 RS 84, MCL 552.18, any unvested pension, annuity, or retirement benefits.

The parties agree that a portion of defendant's pension benefits accrued before their marriage. However, in awarding 55% of defendant's monthly pension payment of \$5,104.20 to plaintiff as spousal support, the court found that the award would allow plaintiff to adequately cover her expenses, account for defendant's fault, and allow plaintiff to acquire medical insurance. The court's order is consistent with the proofs and testimony at trial. The parties had a 27-year marriage, during which time defendant had been the primary wage-earner in the family. Although defendant is retired due to health concerns, he has an annual pension income of \$51,880. Plaintiff has a high school diploma and a cosmetology license that she had not used for 28 years. Although plaintiff is in good health, she testified that she needs inhalers for her asthma issues. Plaintiff was covered under defendant's insurance but would lose coverage after the parties' divorce. She testified that the cost of health insurance after the parties' divorce would be approximately \$650. Moreover, defendant insisted on a divorce rather than separate maintenance, and maintained that he was willing to bear the extra financial burden associated with divorce.

In light of these factors, it was "just and reasonable" for the trial court to include in its considerations the portion of defendant's pension that had accrued before the marriage. *Booth*, 194 Mich App 291. Additionally, because the trial court did not consider that portion of defendant's pension to be defendant's separate property, the court was not required to consider the statutory exceptions for invading a separate estate under MCL 552.23<sup>3</sup> and MCL 552.401.<sup>4</sup>

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<sup>3</sup> MCL 552.23(1) provides as follows:

Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

<sup>4</sup> MCL 552.401 provides as follows:

The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property. The decree, upon becoming final, shall have the same force and effect as a quitclaim deed of the real estate, if any, or a bill of sale of the personal property, if any, given by the party's spouse to the party.

Defendant also argues that the trial court erred by awarding plaintiff 100% of her retirement benefits without making a determination of the value of those benefits. Plaintiff's list of assets and liabilities that accompanied her trial brief listed her Office of Retirement Services (ORS) retirement benefits as valued at \$11,166.86. Defendant's counsel solicited testimony from plaintiff that defendant was informed of the existence of this benefit at a pretrial settlement conference. At trial, the parties discussed plaintiff's list of assets and liabilities and, after making modifications, the parties' stipulated to the value of the property on the list and entered it as an exhibit. Although the trial court did not make specific reference to the value of the ORS benefits in either its order or the judgment of divorce, there is no reason to conclude that it was unaware of the value of these benefits. And we do not find that the award of these benefits to plaintiff renders the trial court's disposition inequitable. *Parks*, 303 Mich App at 555.

## V. SURVIVOR BENEFIT

Defendant also contends that in awarding 55% of defendant's pension benefits to plaintiff, the trial court erred by failing to accurately value the survivor benefit for which defendant pays. We disagree.

A right to vested pension benefits accrued during a marriage must be considered part of the marital estate that is subject to award on divorce. MCL 552.18(1); *Vander Veen v Vander Veen*, 229 Mich App 108, 110-111; 580 NW2d 924 (1998). However, depending on the equities and circumstances of the particular case, pensions may be distributed through either the property settlement or an award of alimony. *Magee v Magee*, 218 Mich App 158, 164-165; 553 NW2d 363 (1996). The methods used for valuation and distribution of pension benefits may vary. *Boyd v Boyd*, 116 Mich App 774, 782; 323 NW2d 553 (1982). With security of the family as a primary concern, a court can use property of either party to achieve just and reasonable support after taking into consideration the parties' ability to pay, the character and situation of the parties, and the circumstances of the case. MCL 552.23(1); *Booth*, 194 Mich App at 290.

Defendant testified that at the time of his retirement, the parties jointly agreed to elect the survivor benefit under which, upon defendant's death, plaintiff would receive 70% of the amount that defendant was receiving as a pension. Defendant testified that he pays \$401.25 a month for the survivor benefit, which is deducted from his monthly pension plan before any taxes. The judgment of divorce provides as follows:

IT IS FURTHER ORDERED AND ADJUDGED Plaintiff is awarded any defined benefit and defined contribution plans in her name as indicated previously in this judgment, and in addition thereto, Plaintiff shall be awarded 55% of Defendant's defined benefit plan which Defendant is currently in draw status, through the Plumbers and Pipefitters Union, including a like proportionate share of all ancillary benefit, including the full 70% joint and survivor benefit consistent with what the parties selected at the time of Defendant's retirement. A separate Qualified Domestic Relations Order shall be prepared consistent hereto.

The trial court heard testimony regarding the parties' election of the survivor benefit and the financial impact of the benefit on defendant; nevertheless, it awarded plaintiff the full 70% of the survivor benefit.

Defendant argues that plaintiff could receive a greater benefit upon defendant's death than she otherwise receives under the judgment of divorce, and that the trial court should have accounted for this possibility in determining the disposition of the pension benefits. This financial benefit is of course speculative and reliant on defendant predeceasing plaintiff. We do not fault the trial court for not explicitly assigning a value to a benefit that plaintiff may never receive. Because there is no way of knowing which party will predecease the other, the trial court did not err by failing to consider the potential financial impact of the survivor benefit on plaintiff. *Parks*, 303 Mich App at 555.

## VI. ATTORNEY FEES

Finally, defendant contends that the trial court erred by awarding plaintiff attorney fees and by not holding a hearing regarding the reasonableness of the fees. We disagree.

In a divorce action, attorney fees are "awarded only as necessary to enable a party to prosecute or defend a suit but are also 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." *Richards*, 310 Mich App at 700 (quotation marks and citation omitted). MCR 3.206(C) provides as follows:

(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, and 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.

MCR 3.206(C)(2) thus provides two independent bases for awarding attorney fees and expenses. While MCR 3.206(C)(2)(a) allows payment of attorney fees based on one party's ability and the other's inability to pay, MCR 3.206(C)(2)(b) considers only a party's behavior, without regard to the ability to pay. See *Richards*, 310 Mich App at 700-701.

Plaintiff testified that while defendant was ordered to pay her from his pension temporary monthly spousal support of \$1,143, he often failed to make timely payments, thus forcing her attorney to file various motions to enforce defendant's support obligation. Before filing the motions, plaintiff's attorney sent letters to defendant and left telephone messages in an attempt to induce defendant to comply with the court's orders. Plaintiff also testified that the parties scheduled a pretrial settlement meeting at her lawyer's office, but that defendant arrived and informed them that there was no way they could reach a settlement. As a result of these actions, plaintiff testified that she had spent over \$6,200 in attorney fees as of May 2015. Plaintiff stated

that she incurred an additional \$3,000 to \$4,000 in attorney fees through trial. Plaintiff explained that she had had to borrow money from her parents to cover some of her attorney fees. Plaintiff confirmed that she had received a bill of the fees from her attorney and that she found the fees to be reasonable. Documentation of the attorney fees was admitted as an exhibit at trial without any objection by defendant.

In a written opinion, the trial court found that defendant had repeatedly failed to comply with court orders and had been “obstructionist and obstinate.” It noted that plaintiff had incurred extra attorney fees because of defendant’s failure to make court-ordered support payments, which failure resulted in motions and further orders. The court also noted that one such motion was then pending before the court. The court further found that an award of attorney fees was appropriate based on plaintiff’s need, as discussed earlier in the court’s opinion, and on defendant’s misconduct and greater ability to pay. The court awarded plaintiff \$5,000 in attorney fees to be deducted from defendant’s 50% share of marital home proceeds. The trial court’s findings were sufficient to establish that defendant’s actions had caused plaintiff to incur additional attorney fees, that plaintiff was unable to pay the expenses of the action, and that defendant was able to pay, thereby satisfying both bases for awarding attorney fees under MCR 3.206(C)(2).

Further, although a trial court should hold an evidentiary hearing when the opposing party challenges the reasonableness of a fee request, *B & B Investment Group v Gitler*, 229 Mich App 1, 15; 581 NW2d 17 (1998), the trial court did not err by awarding attorney fees without such a hearing in this case, because defendant never challenged the hourly rate charged by plaintiff’s attorney or the amount of hours of work performed, but rather only argued that he had not caused plaintiff to incur added attorney fees. And even on appeal, although defendant argues that the trial court “erred by not conducting a hearing or finding facts regarding the reasonableness of the fees incurred,” defendant makes no actual argument that either the hourly rate or the amount of hours billed was unreasonable. We conclude that defendant has abandoned the issue of the reasonableness of plaintiff’s attorney fees with regard to the hourly rate and number of hours billed, and that the trial court did not abuse its discretion by awarding attorney fees based on defendant’s misconduct and plaintiff’s inability to pay. MCR 3.206(C)(2); *Head v Phillips Camper Sales & Rental, Inc.*, 234 Mich App 94, 113; 593 NW2d 595 (1999); see also *Cassidy v Cassidy*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (2017) (Docket Nos. 328004; 328024; 333319); slip op at 14.

Affirmed.

/s/ Jane E. Markey  
/s/ Amy Ronayne Krause  
/s/ Mark T. Boonstra