STATE OF MICHIGAN

COURT OF APPEALS

LYNNETTE KAY DANIELS,

Plaintiff-Appellee,

v

PHILLIP WAYNE DANIELS,

Defendant-Appellant.

UNPUBLISHED
September 17, 2020

No. 348950
Lapeer Circuit Court
Family Division
LC No. 18-052052-DM

Before: RIORDAN, P.J., and O'BRIEN and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. We affirm the judgment of divorce, but vacate the trial court's award of attorney fees.

The parties were married for over 20 years before plaintiff filed for divorce. At the divorce trial, the parties' incomes were a source of contention. Plaintiff wanted the trial court to rely on the parties' 2018 incomes when calculating child and spousal support. Defendant wanted the trial court to rely on the parties' projected 2019 incomes when calculating child and spousal support. Defendant believed that he was on track to earn less in 2019 than 2018, while plaintiff was on track to earn more. The trial court ultimately decided to rely on the parties' 2018 incomes. In addition, the trial court awarded plaintiff $3,000 in attorney fees.

Defendant first argues that the trial court erred when it used the parties 2018 incomes to calculate child support and spousal support. We conclude that the trial court did not clearly err in its findings of fact and did not abuse its discretion in the award of support.

In a divorce case, the determination of income is a finding of fact, and this Court "reviews for clear error the factual findings underlying the trial court's rulings." *Berger v Berger*, 277 Mich App 700, 702; 747 NW2d 336 (2008). "Whether to award spousal support is in the trial court's discretion, and we review the trial court's award for an abuse of discretion." *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). "If the trial court's findings are not clearly erroneous, we must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Id*. at 433 (cleaned up). "The trial court's decision regarding spousal support must be affirmed

unless we are firmly convinced that it was inequitable." *Id*. This Court reviews de novo whether the trial court properly followed the Michigan Child Support Formula (MCSF) when awarding child support. *Ewald v Ewald*, 292 Mich App 706, 714; 810 NW2d 396 (2011).

The divorce trial in this case occurred in March of 2019, approximately three months into 2019. Rather than attempt to calculate the parties' 2019 incomes using paystubs from 2019, the trial court chose to rely on the parties' 2018 incomes. The trial court explained this decision as follows:

> As far as income, both parties have said they can work overtime. Defendant voluntarily changed his job, which resulted in the loss in income. Plaintiff went from sort of part-time to full-time last year, in April. It was her testimony regarding overtime was a little misleading, but apparently she was getting the overtime if they stayed over a little bit, and the management doesn't want them doing that unless there's approved overtime that they're controlling. So it's a little bit of disagreement there.
>
> But the long and short of it is, I'm not going to speculate as to what these parties are going to do the rest of the year, whether they're going to voluntarily work overtime. Both of them say they can. Whether they do or not, I'm not going to get involved in forcing them to do that.
>
> So the Court's satisfied the best course is to take what we know and not speculate on the future. We're going to use the 2018 W-2's for both parties to establish income, to calculate child support then with the overnights as the Court's ruled, which I don't know what those overnights are at this point, but—so the Court's ruling is as far as using income, it's going to be the 2018 W-2's, their actual income from last year for a full year.

The trial court's decision regarding income meant that it calculated defendant's child-support and spousal-support obligations using the parties' 2018 incomes, rather than their projected 2019 incomes. On appeal, defendant argues that this was unfair because defendant had changed positions at work so that he was no longer required to work overtime, whereas plaintiff had switched from part time to fulltime work in April of 2018 in addition to often working overtime.

"A trial court must strictly comply with the requirements of the MCSF in calculating the parents' support obligations unless it 'determines from the facts of the case that application of the child support formula would be unjust or inappropriate.' " *Borowsky v Borowsky*, 273 Mich App 666, 673; 733 NW2d 71 (2007), quoting MCL 552.605(2). Although the trial court did not make an explicit finding regarding MCSF 2.02(B), its decision to rely on defendant's 2018 income alone implies that the trial court found it would be unjust or inappropriate to rely on defendant's income from 2016 and 2017. In sum, the trial court chose to rely on defendant's 2018 income alone rather than an average of his 2016, 2017, and 2018 income, which would have increased his support obligation. Defendant argues this is unfair but does not provide any authority suggesting that a trial court must calculate the current year's income using paystubs to determine a projected

income. We conclude that the trial court's decision to use the parties' 2018 incomes when calculating child-support and spousal-support obligations was not clearly erroneous.

Defendant argues that by using defendant's 2018 income to calculate child support, the trial court effectively imputed income to defendant. This is because, according to defendant, in 2019 he no longer had the ability to earn what he made in 2018. Under the MCSF, a trial court may impute income if it first determines that "the parent is voluntarily unemployed, underemployed, or has an unexercised ability to earn." *Clarke v Clarke*, 297 Mich App 172, 181; 823 NW2d 318 (2012). The trial court did not make such a determination because it did not actually impute income to defendant. Instead, it relied on defendant's actual 2018 income, rather than guessing at his 2019 income to calculate child support. The MCSF contemplates trial courts looking backward in time to determine a parent's income as evidenced by the fact that the formula instructs courts to use the average of three years' worth of income to calculate child support if a parent's income significantly varies from year to year. Thus, what the trial court did in this case is not inconsistent with the MCSF and did not constitute the imputation of income to defendant.

Defendant also contends that the spousal-support factors weighed against an award of spousal support and that the trial court failed to address the majority of the spousal-support factors. "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). "In deciding whether to award spousal support, factors the trial court should consider include 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." *Id*. (cleaned up).

When ruling on spousal support the trial court stated:

> Spousal support. Again, the Court finds there's a disparity of income. If I were asked to find fault, I'd probably find fault on the defendant in this matter. But I do feel spousal support is indicated. It's a 22 and a half year marriage. Plaintiff is taking on the responsibility of the minor child.
>
> So in looking at a length of time, she has an ability to get a better education, make more money. She already has an associates [sic] degree. The minor child is 15 in a month, so she'll be an adult in three, three and a half years. She'll finish high school. And [t]he Court determines four years of rehabilitative spousal support would be appropriate.
>
> The prognosticator, which was admitted simply as an argument, said $119. That's a—$119 is only $1,428. The disparity of income is more like $25,000. While I don't try to make up the entire disparity, and we do look at child support also, the Court will—trying to adjust it, making it somewhat fair, will impose $200 a month spousal support for four years.

Thus, the trial court focused on attempting to lessen the disparity of income between plaintiff and defendant, which it estimated to be about $25,000. The trial court also indicated it would probably find fault with defendant, that the marriage lasted over 22 years, and that plaintiff was taking responsibility for the minor child. "The primary purpose of spousal support is to

balance the parties' incomes and needs so that neither party will be impoverished, and spousal support must be based on what is just and reasonable considering the circumstances of the case." *Loutts v Loutts*, 298 Mich App 21, 32; 826 NW2d 152 (2012). Accordingly, correcting a disparity in income between the parties is a proper consideration when awarding spousal support, and the award of spousal support was just and reasonable considering the circumstances of the case. The trial court did not abuse its discretion when it awarded plaintiff rehabilitative support of $200 per month for a period of four years.

Lastly, defendant argues that the trial court improperly awarded plaintiff attorney fees because plaintiff failed to prove that she was unable to bear the expense of the litigation or that defendant was able to afford the fees. Because the trial court failed to make the specific findings required by MCR 3.206(D)(2)(a), we vacate the award of attorney fees and remand the case to the trial court for a proper application of the court rule.

"This Court reviews a trial court's award of attorney fees in a divorce action for an abuse of discretion." *Safdar v Aziz*, 327 Mich App 252, 267; 933 NW2d 708 (2019). An abuse of discretion occurs when the result falls outside the range of principled outcomes. *Id*. Attorney fees are authorized in domestic relations cases by both statute and court rule. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). "Either by statute or court rule, attorney fees in a divorce action may be awarded only when a party needs financial assistance to prosecute or defend the suit." *Id*.

It appears in this case that the trial court awarded attorney fees under MCR 3.206(D), which states:

> (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.

The trial court indicated it was awarding attorney fees due to the disparity in income between the parties, thereby implicating MCR 3.206(D)(2)(a). A disparity in the parties' incomes alone, however, does not justify an award of attorney fees under the plain and unambiguous language of MCR 3.206(D)(2)(a). Under the court rule, there must be a specific finding that plaintiff is "unable to bear the expense" of litigating the divorce action to warrant an award of attorney fees. There also must be a finding that defendant "is able to pay" the fees. As the trial court failed to make the specific findings as required by MCR 3.206(D)(2)(a), this Court must

vacate the trial court's award of attorney fees and remand the case to the trial court for a proper application of the court rule.

The trial court also highlighted the fact that defendant walked out of mediation causing a "lost expense." This statement potentially implicates MCR 3.206(D)(2)(b) because it suggests that defendant failed to comply with the trial court's order to participate in mediation. Yet, the trial court did not determine what the "lost expense" of mediation was and emphasized that it was awarding attorney fees because of the disparity of income between the parties. Therefore, it does not appear that the trial court awarded fees under MCR 3.206(D)(2)(b).

We affirm the judgment of divorce, but vacate the trial court's award of attorney fees. If the parties choose to further litigate the issue of attorney fees, the trial court must make the proper findings required by the statute. Neither party having prevailed in full, no costs may be taxed under MCR 7.219(F).

/s/ Michael J. Riordan
/s/ Colleen A. O'Brien
/s/ Brock A. Swartzle