

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT ALAN ZERBA,

Plaintiff-Appellant,

v

ELLEN J. ZERBA,

Defendant-Appellee.

UNPUBLISHED

October 22, 2020

No. 349481

Macomb Circuit Court

LC No. 2018-008448-DO

Before: METER, P.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court’s judgment of divorce between plaintiff and defendant. In this spousal support case, plaintiff argues the trial court clearly erred when it failed to make factual findings regarding: (1) defendant’s change in income, (2) plaintiff’s reasons for foregoing retirement benefits, and (3) defendant’s source of funds to purchase her home. Plaintiff also argues the trial court abused its discretion when the trial court imputed income to plaintiff without considering plaintiff’s investment motivations and source of funds. Lastly, plaintiff argues the trial court abused its discretion when it awarded spousal support to defendant because the trial court’s award was unfair and inequitable. We agree with plaintiff that the trial court clearly erred when it double counted his pension income when determining his ability to pay spousal support. Accordingly, we remand this case to the trial court for redetermination of plaintiff’s income.

I. BACKGROUND

Plaintiff and defendant were married in 1985. Plaintiff worked as an insurance salesman for AAA, while defendant worked sporadically and mostly part-time. The couple had two daughters, one of whom was born with Down Syndrome. Defendant spent most of her time during the marriage at home raising the children.

In 2010, defendant filed for a divorce. Although the proceedings did not result in a divorce between the couple, the result was a legal separation through the entry of a consent judgment of separate maintenance. Under the consent judgment, plaintiff received the marital home, title to two rental properties, and 50% of his retirement benefits, consisting of a pension and a 401(k), and 50% of the assets in their bank accounts. Defendant received the other 50% share of those benefits

and accounts. Defendant also received a monthly spousal support award of \$2,500 from plaintiff. When defendant left the marital home, she purchased her own home for \$105,000.

Plaintiff retired in 2018 and sought a divorce and modification of his spousal support obligation. A bench trial was conducted, after which the trial court granted the divorce and modified plaintiff's spousal support obligation to \$1,250 per month. This appeal followed, and plaintiff now challenges the spousal support award.

II. STANDARD OF REVIEW

"The award of spousal support is within the discretion of the trial court." *Ewald v Ewald*, 292 Mich App 706, 722; 810 NW2d 396 (2011). "The trial court's underlying factual findings are reviewed for clear error." *Id.* at 723. "A reviewing court may determine a finding is clearly erroneous only when, on the basis of all the evidence, it is left with a definite and firm conviction that a mistake has been made." *Id.* "The appellant has the burden to persuade the reviewing court that a mistake has been committed, failing which the trial court's findings may not be overturned." *Id.* "If the trial court's findings are not clearly erroneous, the reviewing court must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Id.* "The trial court's dispositional ruling must be affirmed unless the reviewing court is firmly convinced that it was inequitable." *Id.*

III. DISCUSSION

Plaintiff first argues that the trial court committed error requiring reversal when it failed to make factual findings regarding defendant's increase in income since the parties entered into the consent judgment in 2011. We disagree.

When awarding spousal support, the trial court is required to consider the following factors to guide its analysis:

(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. [*Loutts v Loutts*, 298 Mich App 21, 31; 826 NW2d 152 (2012) (quotation marks and citation omitted).]

Michigan statutory law favors a "case-by-case approach to determining spousal support." *Id.* at 29. Under MCL 522.23(1):

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.

“The primary purpose of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party on the basis of what is just and reasonable under the circumstances of the case.” *Myland v Myland*, 290 Mich App 691, 695; 804 NW2d 124 (2010) (quotation marks and citation omitted). “[G]iven the statutory mandate of MCL 552.23 . . . there is no room for the application of any rigid and arbitrary formulas when determining the appropriate amount of spousal support . . .” *Id.* at 699-700.

Although defendant’s income increased since entry of the consent judgment, she also testified that her monthly obligations continue to exceed her monthly income. This is in large part because of the fact that defendant cares for the parties’ disabled adult daughter, including paying for insurance deductibles and other medical care. We find no inequity from the trial court’s decision to award defendant an amount that attempts to cover her monthly expenses. See *Ewald*, 292 Mich App at 723.

Plaintiff next argues that the trial court failed to make factual findings with regard to the manner in which defendant purchased her home. Plaintiff states the home was purchased under suspicious circumstances, leading to the belief that defendant is hiding assets. Specifically, plaintiff points to the fact that the deed to her home is dated May 11, 2011, but the mortgage is dated May 22, 2012. Defendant testified she borrowed approximately \$70,000 from her sister and obtained a mortgage to pay the balance of the \$105,000 purchase price for her home. She further testified that she repaid her sister with the money she received in the legal separation. Regardless of whether defendant used the mortgage to purchase the home, defendant had to pay \$105,000 to purchase the home. Aside from supposition, plaintiff presented no evidence defendant hid assets. Thus, the trial court did not abuse its discretion by not considering the issue of missing or hidden assets when determining the needs of the parties.

Plaintiff also argues the trial court clearly erred when it double counted plaintiff’s income from his IRA. Plaintiff asserts the trial court imputed income from his lump sum pension distribution, which he rolled into his IRA. Plaintiff is correct that the trial court incorrectly found that plaintiff’s \$2,000 monthly distributions are from his 401(k)—plaintiff testified that he does not access money from his 401(k) and only takes distributions from his IRA. We agree that the trial court erred when it imputed \$2,000 from plaintiff’s pension in addition to the \$2,000 per month that plaintiff draws from his IRA.

In lieu of receiving a regular pension payment, plaintiff took a lump sum distribution of the pension, which he rolled into an IRA. He now draws \$2,000 per month from that IRA. In other words, plaintiff chose to manage the pension assets himself rather than take an annuity payment, in the hope he could grow the principal and, therefore, increase the monthly amount he could draw from it. In determining plaintiff’s monthly income, however, the trial court counted the \$2,000 plaintiff draws from the IRA, and added an additional \$2,000 that, in the trial court’s view, plaintiff would receive if plaintiff elected to take the annuity payments from the pension. The net effect of the trial court’s finding results in the perception that plaintiff could receive \$4,000

per month in distributions from the pension. This finding is clearly erroneous because it is contrary to the testimony presented and has no basis in the record. See *Ewald*, 292 Mich App at 723. Therefore, we remand this case to the trial court to determine plaintiff's appropriate monthly income for purposes of assessing his ability to pay spousal support. See *Loutts*, 298 Mich App at 31.

IV. CONCLUSION

Reversed and remanded for further proceedings consistent with this opinion.¹ We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Douglas B. Shapiro
/s/ Michael J. Riordan

¹ On appeal, defendant requested attorney fees and costs. Pursuant to MCR 3.206(D)(1), defendant “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.” However, defendant must establish that she is unable to bear the expense of the action and that plaintiff is able to pay. MCR 3.206(D)(2)(a). See also *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010) (“[A] party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support.”). Defendant concedes that it would be appropriate for the trial court to make the required factual determinations and we agree. See *Allen v Keating*, 205 Mich App 560, 564; 517 NW2d 830 (1994) (“Appellate review is limited to issues actually decided by the trial court.”). The record does not indicate the amount of attorney fees and costs that defendant seeks, and therefore, it is unclear from the record whether defendant would be able to bear the expense and whether she would need to invade assets to do so. Because the record is insufficient to address this issue on appeal, defendant may raise the issue on remand where the trial court may develop the factual record and make a determination in the first instance.