

STATE OF MICHIGAN
COURT OF APPEALS

KIMBERLY KUIPER,

Plaintiff-Appellee,

v

JOSEPH KUIPER,

Defendant-Appellant.

UNPUBLISHED

October 29, 2020

No. 352789

Kent Circuit Court

LC No. 19-001095-DM

Before: MURRAY, C.J., AND CAVANAGH AND CAMERON, JJ.

PER CURIAM.

Defendant, Joseph Kuiper, appeals a default judgment of divorce. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Plaintiff, Kimberly Kuiper, and defendant were married in 1993. They had three children together during the marriage. In February 2019, plaintiff filed for divorce. Defendant filed an answer and a counterclaim for divorce. Although the parties agreed to an equitable division of the property, the parties disputed custody and the amount of spousal support and child support that defendant should be ordered to pay plaintiff. Discovery commenced, and a settlement conference was scheduled for July 10, 2019. Plaintiff and defendant were both ordered to appear at the settlement conference. After defendant failed to appear, the trial court entered a default. Soon after the default was entered, defendant moved to set the default aside. At the hearing on defendant’s motion, which defendant did not attend, defense counsel informed the trial court that defendant had suffered a concussion from a cycling accident the night before the July 10, 2019 settlement conference. Defense counsel provided the trial court with medical documents, which revealed that defendant had gone to the emergency room on the evening of July 10, 2019, and was diagnosed with a concussion. In response, plaintiff argued that defendant was not injured and that he had simply forgotten about the settlement conference despite being provided with multiple notices. Plaintiff noted that defendant went to the hospital only after he had missed the settlement conference and the default order had been entered. The trial court acknowledged that it was possible that defendant provided “misinformation” at the emergency room. However, the court

concluded that sufficient information had been presented to warrant granting defendant's motion to set aside the default.

The trial court scheduled a second settlement conference, which was to commence on October 9, 2019, at 2:00 p.m. After defendant failed to appear in a timely manner, the trial court entered another default at 2:37 p.m. Defendant moved to set aside the default. Plaintiff opposed the motion and moved the trial court to enter a default judgment of divorce, uniform child support order, and the uniform spousal support order. At the motion hearing, defendant appeared and explained that he had been in a motor vehicle accident on his way to the October 2019 settlement conference and, as a result, he was unable to arrive at the courthouse until 3:00 p.m. Defendant presented a police report to the trial court to show that his car accident occurred at 2:02 p.m. Plaintiff, who was still living in the same house as defendant, contended that defendant did not leave for the settlement conference until 20 minutes before it was scheduled to start. The trial court, noting that defendant was already running late when the accident occurred and that he then failed to successfully contact anyone after the accident to explain his absence, denied defendant's motion to set aside the default.

The trial court granted plaintiff's motion to enter a default judgment of divorce, uniform child support order, and the uniform spousal support order. The trial court recognized that the parties disputed custody, property division, and spousal support, so it stated that it would schedule an evidentiary hearing and a Friend of the Court assessment. The trial court then took testimony from plaintiff. Plaintiff testified that the judgment of divorce was fair and equitable and that the custody and parenting time arrangement was in the minor children's best interests.

Defendant later moved to set aside the default judgment of divorce. He reiterated the reasons that he had missed both settlement conferences and argued that the trial court had failed to make the necessary findings of fact before entering the default judgment of divorce. At a hearing on the motion, the trial court explained that it had carefully reviewed every document presented to it and that it had properly entered the default judgment of divorce, uniform child support order, and spousal support order. The trial court explained that it had ordered the evidentiary hearing and Friend of the Court assessment as a courtesy to defendant. The court also indicated that it did not need to make explicit findings in the record regarding custody, property division, child support, and spousal support. The trial court then denied defendant's motion and canceled the assessment and evidentiary hearing. This appeal followed.

II. ANALYSIS

A. SETTING ASIDE OF DEFAULT AND DEFAULT JUDGMENT OF DIVORCE

Defendant argues that the trial court abused its discretion by failing to set aside the default and the default judgment of divorce because good cause existed. We disagree.

"The ruling on a motion to set aside a default or a default judgment is entrusted to the discretion of the trial court." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). "Unless there has been a clear abuse of discretion, a trial court's ruling will not be set aside." *Id.* "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v Hayford*, 279 Mich App 324, 325;

760 NW2d 503 (2008). “[A]lthough the law favors the determination of claims on the merits, it has also been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered.” *Shawl v Spence Bros, Inc*, 280 Mich App 213, 221; 760 NW2d 674 (2008) (quotation marks and citation omitted).

MCR 3.210(B)(3) provides guidance on setting aside a default before entry of default judgment in domestic relations cases, stating that “[a] motion to set aside a default, except when grounded on lack of jurisdiction over the defendant or subject matter, shall be granted only upon verified motion of the defaulted party showing good cause.” MCR 3.210(B)(6)(a) provides guidance on setting aside a default judgment in domestic relations cases, and it provides that “[a] motion to set aside a default judgment . . . shall be granted only if the motion is filed within 21 days after the default judgment was entered and if good cause is shown.”

“Good cause sufficient to warrant setting aside a default or a default judgment may be shown by (1) a substantial procedural defect or irregularity or (2) a reasonable excuse for the failure to comply with the requirements that created the default.” *Koy v Koy*, 274 Mich App 653, 658; 735 NW2d 665 (2007). Whether there is good cause is based on the totality of the circumstances. *Shawl*, 280 Mich App at 236-237. Factors relevant to the establishment of good cause include:

(1) whether the party completely failed to respond or simply missed the deadline to file; (2) if the party simply missed the deadline to file, how long after the deadline the filing occurred; (3) the duration between entry of the default judgment and the filing of the motion to set aside the judgment; (4) whether there was defective process or notice; (5) the circumstances behind the failure to file or file timely; (6) whether the failure was knowing or intentional; (7) the size of the judgment and the amount of costs due under MCR 2.603(D)(4); (8) whether the default judgment resulted in an ongoing liability (as with paternity or child support); and (9) if an insurer is involved, whether internal policies of the company were followed. [*Id.* at 238 (footnote omitted).]

When considering the totality of the circumstances, we conclude that the trial court did not abuse its discretion when it held that the motor vehicle accident was not a reasonable excuse to set aside the October 2019 default. The October 2019 settlement conference was the second settlement conference that defendant had failed to attend in a timely manner. Defendant missed the July 2019 settlement conference because he claimed that he had suffered a concussion from a head injury sustained while riding his bicycle the night before the settlement conference. Although the trial court was unsure whether defendant’s claim was a ruse, and although defendant failed to attend the hearing on the motion to set aside the July 2019 default, the trial court granted defendant’s motion.

On the day of the October 2019 settlement conference, defendant did not leave his home until 20 minutes before the conference started, and defendant informed his attorney that he was “running late.” The motor vehicle accident, for which defendant admitted he was legally at-fault, occurred at 2:02 p.m. Thus, defendant was already late for the settlement conference when the accident occurred. Defendant then failed to successfully contact his attorney, plaintiff, or the trial court to inform them about the accident and to explain his absence. Although defendant’s attorney was present, review of the trial court’s order reveals that the trial court had specifically ordered

defendant to attend the settlement conference. See MCR 2.401(F)(1). Moreover, because defendant had once worked as a trial attorney, it reasonably follows that he was aware of the importance of complying with the trial court's directives. Therefore, we conclude that the trial court did not abuse its discretion by denying defendant's motion to set aside the October 2019 default. Additionally, we conclude that the trial court did not abuse its discretion by refusing to set aside the default judgment of divorce. Although defendant moved to set aside the default judgment within the requisite 21 days and the judgment results in ongoing liability, we conclude that a totality of circumstances support the trial court's denial of defendant's motion.

Defendant also argues that the trial court erred by entering the default because defendant's attorney was present at the October 2019 settlement conference, because entry of the default resulted in a manifest injustice, and because defendant's failure to attend was not a result of culpable negligence. Defendant did not raise these arguments below, thereby rendering them unpreserved. See *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386-387; 803 NW2d 698 (2010). We therefore review for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.*, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An error has affected a party's substantial rights when there is "a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763.

Defendant's argument requires consideration of MCR 2.401, which provides the following:

(F) Presence of Parties at Conference. If the court anticipates meaningful discussion of settlement, the court may direct that the parties to the action, agents of parties, representatives of lienholders, or representatives of insurance carriers, or other persons:

(1) be present at the conference or be immediately available at the time of the conference; and

(2) have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement.

The court's order may require the availability of a specified individual; provided, however, that the availability of a substitute who has the information and authority required by [MCR 2.401(F)(2)] shall constitute compliance with the order.

* * *

(G) Failure to Attend or to Participate.

(1) Failure of a party or the party's attorney or other representative to attend a scheduled conference or to have information and authority adequate for responsible and effective participation in the conference for all purposes, including

settlement, as directed by the court, may constitute a default to which MCR 2.603 is applicable or a ground for dismissal under MCR 2.504(B).

(2) The court shall excuse a failure to attend a conference or to participate as directed by the court, and shall enter a just order other than one of default or dismissal, if the court finds that

(a) entry of an order of default or dismissal would cause manifest injustice;
or

(b) the failure was not due to the culpable negligence of the party or the party's attorney.

Thus, MCR 2.401(F) permits a trial court to compel a party to appear at a settlement conference or to be immediately available at the time of the conference. A party's failure to attend a settlement conference may be grounds for entry of an order of default. See MCR 2.401(G)(1).

In this case, the trial court specifically ordered defendant to attend the October 2019 settlement conference, which was to commence at 2:00 p.m. Specifically, the scheduling order provided, in relevant part:

At the settlement conference, each party and his or her attorney shall be personally present and must be fully prepared and authorized to meaningfully discuss settlement Failure to attend will result in the sanctions authorized by MCR 2.401(G)(1)[.]

Nonetheless, defendant did not appear at the October 2019 settlement conference in a timely manner. Although he informed his attorney that he was "running late" before the accident occurred, he did not successfully contact his attorney, plaintiff, or the trial court to explain his absence after the accident occurred. Importantly, the accident occurred two minutes after the settlement conference was scheduled to begin. Thus, because defendant failed to appear at the scheduled settlement conference in a timely manner, the trial court was permitted to enter a default unless doing so "would cause manifest injustice" or "the failure [to attend] was not due to [defendant's] culpable negligence[.]"

A "manifest injustice" occurs if the trial court permits the default to stand even though the defaulted party has "satisfied the 'meritorious defense' and 'good cause' requirements" of MCR 2.603(D)(1), which governs motions to set aside a default judgment. See *Alken-Ziegler*, 461 Mich at 233. A "'manifest injustice' is not a discrete occurrence such as a procedural defect or a tardy filing that can be assessed independently." *Id.* In this case, for the reasons already discussed, we conclude that defendant failed to satisfy the good cause requirement to set aside the default. Consequently, defendant's "manifest injustice" argument must also fail. See *id.*

Additionally, contrary to defendant's arguments on appeal, we conclude that his failure to attend the October 2019 settlement conference was the result of his culpable negligence. Although there is no indication that the motor vehicle accident was intentional, defendant fails to appreciate that he was already late for the settlement conference when the accident occurred. This was the case even though defendant was aware of the date and time of the settlement conference and even

though defendant had already been penalized for failing to attend the July 2019 settlement conference. Additionally, defendant failed to successfully contact anyone immediately after the motor vehicle accident occurred. Instead, defendant waited for the police to give him a ride to the courthouse. Defendant arrived one hour after the settlement conference was scheduled to begin and after the default had been entered. Therefore, we conclude that the trial court did not plainly err by entering the default.

B. FACTUAL FINDINGS

Defendant next argues that this Court should reverse the trial court's decision to deny his motion to set aside the default judgment of divorce because the trial court made insufficient factual findings on the issues of the division of marital property, child custody, spousal support, and child support. However, defendant's argument does not identify a procedural defect. Instead, defendant challenges the substance of the default judgment of divorce. That being said, we conclude that remand is required so that the trial court can make factual findings regarding the division of marital property, child custody and parenting time, spousal support, and child support.

"Unlike virtually all other civil litigation between competent individuals, a divorce, even when settled, requires a hearing in the circuit court and the taking of proofs before a judgment can be entered." *Rettig v Rettig*, 322 Mich App 750, 754; 912 NW2d 877 (2018) (citation omitted). MCR 3.210(B)(5) provides, in relevant part:

(a) A judgment of divorce . . . may not be entered as a matter of course on the default of a party because of failure to appear at the hearing or by consent, and the case must be heard in open court on proofs taken, except as otherwise provided by statute or court rule.

(b) Proofs for a default judgment may not be taken unless the proposed judgment has been given to the court

(c) The moving party may be required to present evidence sufficient to satisfy the court that the terms of the proposed judgment are in accordance with law. The court may consider relevant and material affidavits, testimony, documents, exhibits, or other evidence.

(d) In cases involving minor children, the court may take testimony and receive or consider relevant and material affidavits, testimony, documents, exhibits, or other evidence, as necessary, to make findings concerning the award of custody, parenting time, and support of the children.

At the outset, we note that *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004), and its progeny do not assist in resolving this appeal. *Harvey* involved a consent order, and it was in that context the Court ruled that a judge signs custody orders "only after profound deliberation and exercise of the judge's traditional broad discretion." *Harvey*, 470 Mich at 193. Since this appeal does not involve a consent judgment, *Harvey*'s limited requirement on fact-finding is inapplicable. Hence, the court was permitted to limit the evidence to what was attached to the motion for entry of default judgment to ensure that the default judgment was in accordance with

the law, MCR 3.210(B)(5)(c), and any necessary findings are limited to only those that are particularly relevant. *Sparks v Sparks*, 440 Mich 141, 159; 485 NW2d 893 (1992).

With respect to the division of marital property, in *Koy*, 274 Mich App 653, this Court held that even when a default judgment is appropriately entered, the trial court must still make an equitable division of the marital estate and make factual findings thereof. Although the *Koy* Court acknowledged that the defaulting defendant was properly excluded from participating in the adjudication of the marital estate, the Court concluded that “the trial court was still required to equitably divide the marital property and to make findings of fact to support that decision.” *Id.* at 659-660. This Court noted that the trial court “appeared to rely solely on the representations of [the] plaintiff’s counsel in dividing the property” and further concluded that the record was “not adequately developed regarding counsel’s representations or the evidence she relied on regarding the marital assets.” *Id.* at 660. Consequently, the matter was remanded so that the trial court could make factual findings supporting the property division or consider “redistribution of assets.” *Id.*

The reasoning employed in *Koy* also applies in this case. Although we conclude that the default judgment was properly entered, the trial court was required to make an equitable distribution of the marital assets. Instead, the trial court accepted plaintiff’s proposed division of the marital estate and her conclusory testimony that she believed that her proposed division of the marital estate was “equitable.” The trial court did so even though defendant challenged plaintiff’s proposal concerning what should occur if the marital home was not sold within six months. We conclude that, under *Koy*, the trial court was required to make independent findings regarding the property division in conjunction with the entry of the default judgment. Consequently, remand is necessary so that the trial court can either make findings regarding the distribution of marital property as contemplated by the default judgment of divorce or consider redistribution of the property.

We further conclude that remand is necessary so that the trial court can make the requisite findings of fact with respect to custody and parenting time of the two minor children. With respect to custody and parenting time, “all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.” MCL 722.28. See also *Shade v Wright*, 291 Mich App 17, 20-21; 805 NW2d 1 (2010). “[A] trial court is required to determine whether there is an established custodial environment with one or both parents before making *any* custody determination.” *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011). “The failure to determine whether there is an established custodial environment is not harmless because the trial court’s determination regarding whether an established custodial environment exists determines the proper burden of proof in regard to the best interests of the children.” *Id.* at 62.

The trial court has the duty to resolve any custody dispute in the best interest of the children. *Harvey*, 470 Mich at 192. MCL 722.23 sets forth 12 factors to be “considered, evaluated and determined by the court” in deciding the children’s best interests. In parenting time decisions, the trial court “must consider all the factors delineated in MCL 722.23 and explicitly state its findings and conclusions with respect to each of them.” *Spires v Bergman*, 276 Mich App 432, 443; 741 NW2d 523 (2007). The court must also make findings under MCL 722.27a, which governs parenting time. MCL 722.27a(1). “A child has a right to parenting time with a parent unless it is

shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health." MCL 722.27a(3).

In this case, despite defendant's default, the trial court was required to set forth its findings of fact and conclusions of law on the best-interest factors and parenting time. Indeed, case law establishes that the trial court's duty is to serve the children's best interests in fashioning an award of custody and parenting time. Although the trial court indicated that it did not need to make explicit findings and that it could rely on plaintiff's proposal, plaintiff only testified briefly at the hearing concerning her motion for entry of the default judgment of divorce. Additionally, her testimony concerning custody was entirely conclusory in that she only indicated that she believed that the custody and parenting time arrangement that she had proposed was in the minor children's best interests. Consequently, the trial court erred by failing to make specific findings of fact and conclusions of law concerning the established custodial environment and the relevant factors listed in MCL 722.23, including MCL 722.23(g), and MCL 722.27a. Therefore, we remand to the trial court to state its findings and conclusions regarding both custody and parenting time.

Defendant next argues that the trial court erred in its spousal support award because it did not make findings of fact on the record. We agree.

Whether and to what extent to order spousal support is a matter committed to the trial court's discretion. *Loutts v Loutts*, 298 Mich App 21, 25; 826 NW2d 152 (2012). Courts do not apply a strict formula when calculating support; instead, "a trial court's decision to award spousal support is discretionary and should reflect what is just and reasonable under the circumstances of the case." *Id.* at 30 (quotation marks and citation omitted). Courts should consider:

(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. [*Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).]

"The trial court should make specific factual findings regarding the factors that are relevant to the particular case." See *Myland v Myland*, 290 Mich App 691, 695; 804 NW2d 124 (2010) (quotation marks and citation omitted).

In this case, the trial court concluded that defendant's monthly income was \$19,200 and imputed \$4,020 in monthly income to plaintiff. The court then awarded plaintiff spousal support of \$3,947 a month after considering the length of the parties' marriage, plaintiff's age, and plaintiff's education and skill level. To reach this amount, the trial court adopted plaintiff's arguments with respect to spousal support. The trial court also considered that plaintiff had been a stay-at-home mother for approximately two decades and that she was the minor children's primary caregiver. However, the trial court did not expressly consider whether any other relevant factors applied, such as defendant's ability to pay spousal support, the parties' health, the source

and amount of property awarded to the parties, and the effect of cohabitation on the parties' financial status. The trial court also failed to consider the equities in requiring defendant to pay \$3,947 each month in spousal support even though the record was replete with evidence that he suffered from medical issues stemming from a brain tumor, and that his income was derived from disability insurance. Moreover, the trial court imputed to plaintiff a monthly income of \$4,020, but made no explicit findings regarding plaintiff's health or her ability work. Therefore, we conclude that it is necessary to remand to the trial court. On remand, the trial court must consider the relevant factors as they pertain to the parties and make specific findings of fact that justify its ultimate award of spousal support.

Finally, defendant argues that the trial court erred when calculating child support by not "imputing a higher income to [plaintiff] for child support purposes and in ordering that [defendant] begin paying child support while the parties are still living together."

"[T]he first step in determining a child-support award is to ascertain each parent's net income by considering all sources of income." *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007). When assessing a parent's ability to pay support, the trial court is not limited to consideration of a parent's actual income. *Reed v Reed*, 265 Mich App 131, 163; 693 NW2d 825 (2005). Rather, the trial court may consider the parent's voluntary unexercised ability to earn, *Ghidotti v Barber*, 459 Mich 189, 198; 586 NW2d 883 (2005), "and the parent's assets, including those obtained as part of the property division of the divorce," *Reed*, 265 Mich App at 163. As already stated, it is proper to remand the matter so that the trial court can make findings of fact concerning the division of property and spousal support. Because the trial court's findings on remand could alter the appropriate amount of child support, we find that it is proper to also remand the matter for consideration regarding child support.

In sum, we affirm the trial court's decisions to deny defendant's motion to set aside the October 2019 default and the default judgment of divorce. However, we vacate the portions of the default judgment of divorce concerning the distribution of marital property, custody, parenting time, spousal support, and child support and remand the matter so that the trial court can make the required factual findings and conclusions of law regarding these issues. On remand, the trial court must comply with MCR 3.210(B)(5). Additionally, the trial court has discretion to preclude defendant's participation in the proceedings under MCR 3.210(B)(2)(d).

We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Mark J. Cavanagh

/s/ Thomas C. Cameron