STATE OF MICHIGAN

COURT OF APPEALS

SANDRA LEA LOWERY,

Plaintiff-Appellant,

v

GERALD A. LOWERY,

Defendant-Appellee.

UNPUBLISHED
October 11. 1996

No. 181417
LC No. 92-44368-DM

SANDRA LEA LOWERY,

Plaintiff-Appellee,

v

GERALD A. LOWERY,

Defendant-Appellant.

No. 181419
LC No. 92-44368-DM

Before: Young, P.J., and Taylor and R. C. Livo,* JJ.

PER CURIAM.

Both plaintiff and defendant appeal as of right from the judgment of divorce awarding plaintiff periodic spousal support payments of $220 a week for ten years and attorney fees of $6,000. We affirm.

I

Plaintiff first argues that the trial court abused its discretion in failing to award her permanent alimony because the evidence presented at trial established that she would never be able to support herself due to her medical condition, her lack of education, and her lack of job experience. Plaintiff

* Circuit judge, sitting on the Court of Appeals by assignment.

contends that, considering the parties' circumstances, the trial court's alimony award is unjust and unreasonable. We disagree.

The award of alimony is within the trial court's discretion and is to be based on what is "just and reasonable" under the circumstances. *Maake v Maake*, 200 Mich App 184, 187; 503 NW2d 664 (1993); *Pelton v Pelton*, 167 Mich App 22, 27; 421 NW2d 560 (1988). The court's factual findings are reviewed for clear error, and are presumed correct unless the challenging party proves otherwise. *Beckett v Beckett*, 186 Mich App 151, 153; 463 NW2d 211 (1990). A finding is clearly erroneous if this Court, after reviewing the entire record, is left with a definite and firm conviction that a mistake was made. *Ackerman v Ackerman*, 197 Mich App 300, 301-302; 495 NW2d 173 (1992). We have no such conviction in this case.

The factors to be taken into consideration in determining a party's entitlement to alimony include: (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. *Ianitelli v Ianitelli*, 199 Mich App 641, 644; 502 NW2d 691 (1993).

Applying the above factors, the lower court found that long-term spousal support was appropriate on the basis of findings (1) that the parties had been married for approximately twenty-three years; (2) that plaintiff did not complete her formal education, that she had no substantive work experience, and that her annual earnings were nominal and sporadic at most; (3) that defendant earned approximately $49,000 a year as a twenty-two-year employee of Chrysler Motor Corporation; and (4) that plaintiff suffered from many medical problems and her need was evidenced by her receipt of public assistance.

On the other hand, the court opined that permanent alimony was inequitable in light of the court's findings (1) that plaintiff's own doctors testified that her medical conditions would not prevent her from working and being able to contribute to her own support; (2) that plaintiff should be able to secure some type of employment "if she cared to give any effort"; and (3) that defendant had absorbed an overwhelmingly disproportionate share of the marital debt.

On appeal, plaintiff specifically takes issue with the court's findings concerning her health and her ability to work, and defendant's fault in causing the parties' separation and divorce. However, in light of the evidence presented at trial, we conclude that the court's findings with respect to those issues are not clearly erroneous.

First, with respect to plaintiff's medical condition, we find that the expert witnesses' testimony was speculative at best, conditioned upon plaintiff's actual recovery, and even to the extent that a portion of that testimony could be construed in her favor, we note that the court has the option to reject

the conclusion that plaintiff is completely unemployable, and it is not obliged to accept the medical testimony as dispositive. *Sullivan v Sullivan*, 175 Mich App 508, 513; 438 NW2d 309 (1989).

In addition, in light of the fact that plaintiff was only forty-one at the time of trial and had done little to secure any income aside from the temporary spousal support she received, and because plaintiff was guaranteed at least $220 a week for ten years, with an option for modification or extension, we conclude that the court did not clearly err in finding that plaintiff could do something to help contribute to her support, nor did the court abuse its discretion in finding that such an award was fair and equitable under the circumstances.

Similarly, we find that the record supports the court's determination that defendant's fault, if any, carried little weight with respect to defendant's alimony obligation. Plaintiff herself testified that defendant was always supportive of her and helped compensate for her medical problems, mentioning only that she *suspected* that defendant left because he was interested in another woman. Considering the scant testimony the court heard on plaintiff's suspicions concerning defendant, the testimony that both parties contributed to their pervasive financial difficulties (something that both indicated was a problem of the marriage), and the fact that "fault" is only one factor among many to be considered by the court, the lower court likewise did not clearly err in finding that fault did not play a major role in the calculation of alimony.

II

Plaintiff next argues that the trial court erred in failing to characterize defendant's pension funds as a marital asset, and further erred in failing to award plaintiff one-half of those funds. We find that plaintiff's argument is factually incorrect and without merit.

First, it is evident from the court's opinion that defendant's pension plan was indeed considered a divisible marital asset. The opinion states:

> In view of the long term award of spousal support to the plaintiff, the *assets* left to plaintiff by defendant at the time of separation, the tax liability incurred solely by the defendant as the result of his early distribution of Chrysler stock and the fact that the defendant has absorbed an overwhelmingly disproportionate share of the marital debt, the Court finds it would be inequitable to award the plaintiff any portion of defendant's pension as part of the *marital estate.* In the Court's view, plaintiff has already received her fair share of the *marital property* to be divided. The Court instead treats defendant's pension benefits as a component of income which will enable continued support payments, to the extent either party seeks the modification of spousal support payments in the future. [Emphasis added.]

We also note that in the parties' judgment of divorce, the court speaks of defendant's pension benefits under the heading, "DIVISION OF ASSETS AND LIABILITIES," along with the categories of "Personal property" and "Marital debt." Furthermore, we find that the court's treatment of the pension funds as a component of income, being indicative of defendant's ability to pay current and future

alimony payments, is supported by Michigan case law. See *McCallister v McCallister*, 205 Mich App 84, 86-87; 517 NW2d 268 (1994); *Keen v Keen*, 160 Mich App 314, 316-318; 407 NW2d 643 (1987).

Plaintiff is also incorrect in arguing that she is entitled to one-half of the funds accrued during the twenty-two years she was married to defendant. The only requirement for property division of marital assets is that the award be "fair and equitable," which does not necessarily mean that the awards be mathematically equal. *Ackerman v Ackerman*, 163 Mich App 796, 807; 414 NW2d 919 (1987).

In the case at hand, the few assets the parties did own remained in plaintiff's possession. In addition, the evidence indicated that defendant assumed the responsibility of the marital debt, that plaintiff's financial contribution to the parties' marriage was nominal at most, that defendant incurred a hefty tax liability to fund the building of the marital home, and that defendant was obligated to maintain monthly alimony payments of $220 a week for ten years to plaintiff. Under these circumstances, conclude that the lower court did not clearly err in finding that defendant was entitled to one hundred percent of his pension, and the overall distribution (considering alimony, debt, and property) was fair and equitable.

III

Plaintiff's last argument is that the court abused its discretion in awarding an insufficient amount to compensate her attorneys, and also in failing to award any money to reimburse her expert witnesses. We disagree.

An award of attorney fees or other "costs" is within the trial court's discretion, *Wojas v Rosati*, 182 Mich App 477, 480; 452 NW2d 864 (1990); *Giannetti Bros Construction Co v Pontiac*, 175 Mich App 442, 449; 438 NW2d 313 (1989); *Century Dodge, Inc v Chrysler Corp*, 154 Mich App 537, 544-545; 398 NW2d 1 (1986), and is not awarded as a matter of right, but only when necessary to enable a party to carry on or defend the suit, MCL 552.13(1); MSA 25.93(1); *Vaclav v Vaclav*, 96 Mich App 584, 593; 293 NW2d 613 (1980). When attorney fees are awarded, as they were in this case, the amount awarded is for "reasonable fees," not necessarily the attorney's actual fees, *Papo v Aglo Restaurants*, 149 Mich App 285, 299; 386 NW2d 177 (1986). The actual amount of fees requested *may* be considered but is not controlling.

As of August 1993, when the parties submitted their written closing arguments, plaintiff noted that she owed one attorney approximately $4,000, and her trial attorney approximately $6,215. Recognizing her need, the court awarded plaintiff attorney fees in the amount of $6,000, to be evenly divided between the two attorneys. Although the trial court could have made the awards more proportionate, we find that a $3,000 allowance to each attorney is not so inadequate and "so violative of fact and logic that it constitutes a perversity of will, a defiance of judgment, or an exercise of passion or bias." *Wojas*, *supra*. The divorce trial itself took less than one day, included the brief testimony of only four witnesses (including plaintiff and defendant), and did not involve a detailed dispute over property. We find no abuse of discretion.

IV

Finally, defendant argues that the court's alimony award contained within its final judgment of divorce is ineffective because the court erred in modifying the award contrary to the provisions of the court's earlier consent order. Defendant specifically contends that in March 1993, the parties consented to an alimony award of $55.59 a week for 117 weeks, and that that award was not subject to subsequent modification by the court. We disagree.

The issue before this Court is a question of law that is reviewed for clear error. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). When a court incorrectly chooses, interprets, or applies the law, it commits legal error that this Court is bound to correct. *Id.*

A review of the record reveals that the March 1993 order, modifying the withholding of defendant's income with respect to alimony, was signed at the conclusion of a motion hearing wherein plaintiff's attorney stated that he would concede to the order as to form only, and specifically requested that the matter be reserved for trial because there were still questions surrounding defendant's pension benefits. The trial court judge then indicated that he would have to "[p]erhaps determine a new support figure." Now, despite the fact that defendant failed to question the court's March 1993 statement indicating that a new spousal support figure may be calculated in lieu of later trial testimony, and his failure to object to the trial testimony, most of which consisted of plaintiff's inability to support herself and her need for alimony, defendant claims that the March 1993 order was to be final on the issue.

We find that the order was not consented to by plaintiff, and was merely an interim order that was subject to modification. *Mitchell v Mitchell*, 198 Mich App 393, 396; 499 NW2d 386 (1993); MCR 2.604(A). Furthermore, we note that logic dictates that the court order was temporary in nature, given the fact that the court had not yet heard formal testimony on the matter, including such things as plaintiff's medical condition, her lack of income, the parties' property, their assets and liabilities, and defendant's income and pension benefits (all being factors relevant to the court's calculation of alimony).

Affirmed.

/s/ Robert P. Young
/s/ Clifford W. Taylor
/s/ Robert C. Livo