

STATE OF MICHIGAN
COURT OF APPEALS

LINDA DIANE MCCARTY,

Plaintiff-Appellee,

v

JERRY BRILEY MCCARTY,

Defendant-Appellant.

UNPUBLISHED

August 26, 1997

No. 192093

Berrien Circuit Court

LC No. 94-001450-DO

Before: Gage, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

In this divorce action, defendant appeals the trial court's division of marital property, award of alimony to plaintiff, and award of attorney fees to plaintiff. We affirm.

I

Defendant first challenges the trial court's disposition of the marital property and its factual findings in this regard. In reviewing the disposition of property in a divorce case, this Court reviews the trial court's findings of fact for clear error. *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995).

Defendant contends that the trial court's finding that plaintiff suffered from Raynaud's syndrome, which affected her ability to secure health insurance and might affect her future ability to work, was clearly erroneous. We disagree. This finding was supported by plaintiff's testimony that she had been diagnosed with Raynaud's syndrome approximately ten years ago, that she was generally healthy at present although the condition is related to circulation problems and rheumatic arthritis, and that she had experienced difficulty in the past getting health insurance coverage because of this preexisting condition.

Defendant also challenges the trial court's finding that he was at fault for the breakdown of the marriage. Defendant testified that he was not a dutiful, attentive husband and had failed to show affection to his wife until recently, and plaintiff testified that she had lost feeling for defendant over time after he failed to acknowledge birthdays and anniversaries and failed to express love for her. Based on this testimony, the trial court's finding was not clearly erroneous.

Defendant contends that the trial court's finding that plaintiff's earning potential was \$150 per week was clearly erroneous. We disagree. Plaintiff testified that her weekly earnings from her part-time employment ranged between \$100 and \$150, that she had unsuccessfully attempted to secure full-time employment, that although she did have a beautician license she had not worked as a beautician for thirty years and would need to be re-trained to work as a beautician, and that she had alternative plans to go to school to attain a massage therapist license. Given this testimony, the trial court's finding was not clearly erroneous.

Defendant also challenges the trial court's finding that his annual income was \$60,000 to \$75,000. Defendant testified that many personal expenses, such as his electricity bill and the mortgage payment on his house, were paid directly through his business and that he runs his personal account through his business account. Based on tax returns, defendant's net income averaged approximately \$47,500 for the years 1989 through 1994. Plaintiff testified that defendant's gross income was approximately \$90,000 if those personal expenses paid through defendant's business are added to his net business earnings. In divorce cases, income has been broadly interpreted to include items other than just net taxable income for federal income tax purposes. *Torakis v Torakis*, 194 Mich App 201, 204; 486 NW2d 107 (1992). Based on the testimony, the trial court found that defendant's annual income was actually \$60,000 to \$75,000 with the addition of personal mortgage, utility, and property tax payments made through defendant's business. This finding was not clearly erroneous. If the average amount of these personal expenses are added to defendant's reported net income, the trial court could have reasonably arrived at a number in the \$60,000 to \$75,000 range.

Defendant argues that the disposition of the marital property was inequitable. If the trial court's findings of fact are upheld, this Court must decide whether the dispositional ruling was fair and equitable in light of those facts. *Hanaway, supra* at 292. The goal in distributing marital assets in a divorce proceeding is to reach an equitable, though not necessarily equal, distribution of property in light of all the circumstances. *Ackerman v Ackerman*, 163 Mich App 796, 807; 414 NW2d 919 (1987). The trial court is given broad discretion in fashioning its ruling, is held to no strict mathematical formula, and is only required to consider the factors relevant to the case before it. *Sparks v Sparks*, 440 Mich 141, 158-159; 485 NW2d 893 (1992). To reach an equitable division, the 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. *McDougal v McDougal*, 451 Mich 80, 88-89; 545 NW2d 357 (1996); *Sparks, supra* at 158-160. The determination of relevant factors will vary with the circumstances of each case, and no one factor should be given undue weight. *Id.* at 159.

As discussed above, the trial court's findings regarding the factors identified by defendant were not clearly erroneous. Therefore, the trial court's reliance on those factors in making its dispositional award did not result in inequity. Furthermore, in addition to the factors identified by defendant, the trial court made findings on a number of other factors, upon which it also relied in making its dispositional award, including the thirty-one-year length of the marriage, both parties' contributions to the marital estate, that both parties were in their early fifties, and the past conduct of the parties. Based on these factors, the trial court divided the marital property.

Because this initial division favored defendant by approximately seven to ten percent, the trial court recognized the disparity in the distribution and made two additional awards to plaintiff. The trial court ordered defendant to continue to make COBRA health insurance payments for plaintiff for the maximum three-year period of coverage. The trial court also ordered defendant to pay plaintiff's tuition expenses in the next three years to a maximum amount of \$5,000. The trial court further noted that neither of these provisions were to be construed as alimony or to have tax consequences as such. Defendant argues that the trial court erred in failing to designate these payments as alimony but cites no authority for this argument. plaintiff. Defendant has abandoned this issue by failing to provide authority in support of this proposition. *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 14; 527 NW2d 13 (1994). However, this Court has recognized that health insurance premiums may be part of the property division. See *Voukatidis v Voukatidis*, 195 Mich App 338, 339-340; 489 NW2d 512 (1992). The trial court's decision to designate these payments as part of the property award was therefore not erroneous. Even after this additional award of property to plaintiff, the property award still favored defendant by five to seven percent.

Defendant also argues that the trial court erred in failing to credit him for making monthly payments, totaling approximately \$25,000, to plaintiff during their separation. Although defendant takes credit for making these payments to plaintiff, because defendant and plaintiff were still married at the time, these payments came from their joint marital property, not from defendant's individual property. Plaintiff testified that she saved some money from these payments, which she used for a down payment on a car and placed in two savings accounts. Plaintiff was awarded both her car and the value of these savings accounts as part of her property award. So, the portion of the money that had in effect turned into property was in fact distributed as part of the marital estate. The remainder of the money was used by plaintiff for her support during the last months of the marriage and no longer existed as a marital asset. The trial court therefore did not err in failing to credit defendant for these monthly payments.

II

Next, defendant argues that the trial court erred in its award of alimony. Defendant contends that the trial court's findings of fact regarding plaintiff's health, defendant's fault in the breakdown of the marriage, plaintiff's earning capacity, and defendant's income were clearly erroneous. On appeal, we review for clear error the trial court's factual findings upon which the award of alimony is based. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); *Wiley v Wiley*, 214 Mich App 614, 615; 543 NW2d 64 (1995). The trial court's factual findings regarding these factors were discussed in detail above. For the reasons given above, the trial court's factual findings regarding these factors were not clearly erroneous.

Defendant also claims that the award of alimony was inequitable because the alimony was awarded for too long a time and in too high an amount. If the trial court's factual findings are upheld, the trial court's decision as to alimony must be affirmed unless this Court is firmly convinced that it was inequitable. *Sparks, supra* at 152. The main objective of alimony is to balance the incomes and needs of the parties in a way which will not impoverish either party. *Ackerman, supra* at 302. Alimony is to

be based on what is just and reasonable under the circumstances of the case. *Maake v Maake*, 200 Mich App 184, 187; 503 NW2d 664 (1993).

In addition to the factual findings which defendant challenged, the trial court made a number of additional findings upon which it based the award of alimony. The trial court found that this had been a long-term marriage of thirty-one years, that plaintiff stayed in the home and assisted in the business and in raising the family, that the parties were in their early fifties, that there was a great disparity between defendant's and plaintiff's incomes, that the property award favored defendant, and that defendant would be able to pay alimony and still maintain his standard of living. Based on these factors the trial court awarded plaintiff alimony of \$800 per month until she reaches the age of sixty-five or until the death of either party or the remarriage of plaintiff.

It is clear from the record that the trial court attempted to balance the incomes and the needs of the parties and fashioned an award that would allow plaintiff to maintain her standard of living based on her expenses and her income but that would not impoverish defendant given his income and assets. Consequently, the trial court's alimony award was equitable.

III

Finally, defendant argues that the trial court erred in awarding plaintiff attorney fees because plaintiff did not demonstrate a financial inability to pay the fees and, based on the property and alimony awards plaintiff received, she had sufficient funds with which to pay her attorney fees.

Attorney fees in a divorce action should only be awarded as necessary to enable a party to prosecute or defend a suit. *Hanaway, supra* at 298. Even if the trial court does not make an express finding that the party would be unable to pursue the action without an award, such a finding may be implicit given the trial court's other rulings, such as that a party has limited means of support. *Kurz v Kurz*, 178 Mich App 284, 297-98; 443 NW2d 785 (1989). Although a party may have been awarded alimony and a substantial portion of the marital property, attorney fees may still be awarded to the party. *Id* A party should not be required to invade her assets to satisfy attorney fees when the party is relying on those assets for her support. *Maake, supra* at 189. This Court reviews the trial court's decision to award attorney fees for an abuse of discretion. *Hanaway, supra* at 298; *Maake, supra* at 189. An abuse of discretion in the award of attorney fees exists only if the result so violates fact and logic that it constitutes a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Wojas v Rosati*, 182 Mich App 477, 480; 452 NW2d 864 (1990).

Plaintiff testified at length about her expenses, her earning potential, her health, and her assets. Although defendant argues that plaintiff did not submit proof of inability to pay her attorney fees, sufficient evidence was presented about plaintiff's financial situation to enable the trial court to find that she would have been unable to pay her attorney fees without invasion of the assets which the trial court determined were necessary for her support. Furthermore, although the trial court did not make an express finding that plaintiff would have been unable to pursue the action without an award of attorney fees, that finding is implicit in the trial court's other rulings about plaintiff's need for support.

Consequently, the trial court did not abuse its discretion in ordering defendant to pay plaintiff's attorney fees.

Affirmed.

/s/ Hilda R. Gage

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald