STATE OF MICHIGAN

COURT OF APPEALS

RONALD D. HONIG,

Plaintiff-Appellant/
Cross-Appellee,

v

VIVIAN E. SLOAN HONIG,

Defendant-Appellee/
Cross-Appellant.

UNPUBLISHED
October 3, 1997

No. 190238
Oakland Circuit Court
LC No. 93-465002-DM

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

PER CURIAM.

Plaintiff appeals as of right, and defendant cross-appeals, the parties' judgment of divorce. We affirm.

Plaintiff and defendant were married in 1976, and have two minor children. After filing for divorce in October 1993, plaintiff moved into an apartment with Michelle Cobb, who had been his secretary at Weisberg and Walkon, a law firm specializing in social security law. As a result of his relationship with Cobb, plaintiff's relationship with his law partners became strained. He left Weisberg and Walkon in July 1994 and moved with Cobb to Texas, where he began his own practice specializing in social security law.

First, plaintiff argues that the trial court clearly erred in imputing income to plaintiff in the amount of $189,000 for purposes of calculating child support. An award of child support rests in the sound discretion of the trial court, and the court's exercise of that discretion is presumed to be correct. *Thompson v Merritt*, 192 Mich App 412, 416; 481 NW2d 735 (1991). This Court reviews the trial court's factual findings in a divorce action for clear error. *Ghidotti v Barber (On Remand)*, 222 Mich App 373, 377; 564 NW2d 141 (1997) lv pending. If the findings are supported, this Court reviews the court's dispositional ruling de novo. *Id.* Generally, this Court will not reverse the trial court's decision to award child support absent an abuse of discretion. *Id.*

Plaintiff argues that the trial court erred by imputing income to plaintiff without a finding of bad faith. We disagree. In *Olson v Olson*, 189 Mich App 620, 622; 473 NW2d 772 (1991), this Court held that when a party voluntarily reduces or eliminates income, and the trial court concludes that the party has the ability to earn an income and pay child support, the court does not err in entering a support order based upon the unexercised ability to earn. This Court expressly rejected a requirement of bad faith or wilful disregard for the interests of the dependent children. *Id*.

Plaintiff argues that income was improperly imputed because he was fully exercising his ability to work. We disagree. The trial court's findings that plaintiff voluntarily reduced his income when he left the firm and that plaintiff has the ability to earn an income comparable to that which he enjoyed at Weisberg and Walkon are not clearly erroneous. *Ghidotti, supra* at 378.

Plaintiff next argues that the trial court abused its discretion in valuing his money market account, which was awarded to defendant, as of the date the complaint was filed, rather than the date of trial. The determination of a valuation date of a marital asset is committed to the trial court's sound discretion. *Thompson v Thompson*, 189 Mich App 197, 199; 472 NW2d 51 (1991). The court acknowledged that plaintiff's money market account had been dissipated by the time of trial, but valued it as of the date of the filing of plaintiff's complaint. The court based its decision on the fact that, had plaintiff not voluntarily left Weisberg and Walkon to start a new practice in Texas, the asset would have been available to the family. Accordingly, the judgment of divorce provides that:

> plaintiff shall pay the defendant the sum of $42,500.00 at 7% annual interest within sixty (60) months from the date of entry of this judgment.

Plaintiff argues that the funds were spent for legitimate purposes, including start up costs for his new law practice, and for the parties' son's bar mitzvah. Plaintiff testified at trial that at the time he filed this action he had $45,000 to 47,000 in his money market account. At the time of trial, there was no money in the account. He testified that he spent $20,000 from the account to pay for his son's bar mitzvah, and $20,000 in legal fees. He also testified that he used funds from the money market account to pay for part of the expenses of his new law practice.

The valuation date for marital assets need not be identical with the calendar date on which the judgment of divorce was entered. *Thompson, supra* at 199. The evidence shows that, less than two weeks after filing his complaint for divorce, plaintiff moved into an apartment with Michelle Cobb on which he paid the rent and utilities. By the date of trial, plaintiff had left his profitable law practice and moved to Texas with Cobb. On this record, it appears that the marriage had broken down long before the date the judgment of divorce was entered. Furthermore, the record supports the trial court's findings that, but for plaintiff's own voluntary decision to begin a new law practice in a different state, the asset would have been available for distribution. Plaintiff testified that his practice was not yet profitable, and he had to use funds from the money market account to pay his attorney fees and expenses Plaintiff presented no evidence to support his claim that he spent $20,000 on the parties' son's bar mitzvah. On this record, we find that the trial court did not abuse its discretion in valuing plaintiff's money market account as of the date he filed his complaint and not the date of trial.

Plaintiff next argues that the trial court committed clear error in valuing his share of Weisberg and Walkon at $250,000 to $270,000. Defendant's expert, Joseph Cunningham, calculated plaintiff's interest in deferred compensation from Weisberg and Walkon based upon plaintiff's agreement with the firm that he would receive 15% of fees collected on cases in progress as they were completed. Plaintiff testified that he actually received 12%. Beyond this, plaintiff did not present any independent evidence from which the court could calculate the value of the asset. Because the trial court's valuation of the asset was within the range established by the evidence, it was not clearly erroneous. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

Plaintiff next argues that the trial court abused its discretion in determining the amount of spousal support. First, plaintiff contends that the trial court erred in finding that defendant required $4,000 month for her household expenses because the finding was based on defendant's unsubstantiated assertion that her expenses were $4,800. However, review of the record reveals that plaintiff stipulated to the admission of defendant's proposed exhibit 32, which represented defendant's expenses, subject to cross-examination. Accordingly, this argument has no merit.

Second, plaintiff contends that that the trial court erred in imputing income of $10,000 per year to defendant when "the undisputed testimony from appellee was that she should earn between $25,000 and $30,000." On review of the record, it appears that plaintiff has mischaracterized defendant's testimony. Defendant testified that, at the time of trial, she believed that she could earn $10 to 20 per hour working part-time. She testified that part-time jobs for which she was qualified and which would accommodate her physical limitations and obligations to her daughter were "limited and difficult to find, but they are out there." She testified that she would like to work full time in the future, and expected that an entry-level full-time position would pay approximately $12,000 per year, and she stated, "in my best years, if I'm lucky, I should earn 25,000 to 30,000." This is far from undisputed testimony that defendant should earn $25,000 to 30,000. Therefore, based on the parties' ages and income potential, the award of spousal support was just and reasonable, and the trial court did not abuse its discretion.

Third, plaintiff contends that the award of spousal support was erroneous because it was based on the assumption that defendant would not be able to work full time until the parties' younger child finished high school in twelve years. Because the judgment of divorce clearly states that the court will review the need for spousal support after five years, plaintiff's argument has no merit

Plaintiff next argues that the trial court's order requiring him to pay for the parties' daughter's tuition to Hillel Day School, a private religious school, violated his First Amendment right to religious freedom. We disagree. Both plaintiff and defendant are religious Jews. Plaintiff's own testimony indicates that he believes that the Hillel Day School would provide the daughter with a superior Jewish education. He stated "If I could afford it, I would love to send my daughter to Hillel." On this record, we find that the court's order does not directly coerce plaintiff to act contrary to his religious belief. *DSS v Emmanuel Baptist Preschool*, 434 Mich 380, 393; 455 NW2d 1 (1990) Therefore, the trial court's order does not burden plaintiff's practice of religion, and so does not violate plaintiff's First Amendment right to free exercise of religion.

Plaintiff also argues that the trial court erred in ordering him to pay the parties' daughter's tuition because a trial court lacks the authority to order payment to a third party in a judgment of divorce. However, plaintiff did not raise this issue in the trial court. Issues raised for the first time on appeal are not subject to appellate review. *Deal v Deal*, 197 Mich App 739, 741; 496 NW2d 403 (1993).

Defendant argues on cross appeal that the trial court erred in failing to provide security against the possibility of plaintiff failing to pay on the note awarded to defendant for the value of plaintiff's money market account. However, the record indicates that defendant did not request security. Therefore, we find no error.

Defendant also argues that the trial court erred in failing to award attorney fees. We disagree. Defendant was awarded substantial assets that she does not require for support. *Maake v Maake*, 200 Mich App 184; 503 NW2d 664 (1993). There is no indication in the record that defendant would have been unable to defend this suit in the absence of an award of attorney fees. Hence, the trial court did not abuse its discretion in denying defendant's request for attorney fees. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). We also decline defendant's request for appellate fees and costs under MCR 7.216(C) because we do not find plaintiff's appeal to be vexatious.

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald