

STATE OF MICHIGAN
COURT OF APPEALS

MARY A. MCIVER,

Plaintiff-Appellant,

v

HAROLD MCIVER,

Defendant-Appellee.

UNPUBLISHED

March 3, 1998

No. 191359

Wayne Circuit Court

LC No. 94-428202 DM

Before: O'Connell, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. We affirm.

At the time of trial, plaintiff was forty-three years old and defendant was forty-six years old. The parties were married in December, 1973. They had two children: Harold, born in May, 1976, and Kamari, born in July, 1978. There was approximately \$17,000 equity in the marital home, which was located on Patton in the City of Detroit. The monthly mortgage payment on the marital home was \$372. Plaintiff worked at General Motors from 1976 to 1986, but was unemployed at the time of trial. Plaintiff claims to be disabled by an "anxiety nervous stress disorder" or an "adrenaline disorder," and she receives \$816 per month in social security payments for her disability. In addition to her social security payments, plaintiff's monthly income includes approximately \$480 from her General Motors pension and \$113 in net rental income from rental property located on Chapel in the City of Detroit. At the time of trial, defendant, an electrician, was employed at the Detroit Board of Education, where he had been employed for the past fourteen or fifteen years. Defendant estimated his earnings for 1995 to be approximately \$36,000. Defendant had pensions from the Detroit Board of Education and from the International Brotherhood of Electrical Workers. Defendant also received rental income from rental property located on Lyndon in the City of Detroit in the amount of \$141 per month.

Plaintiff filed her complaint for divorce in September, 1994. A bench trial was held over two days in June, 1995. Plaintiff testified on the first day of trial but did not appear for the second day of trial. However, plaintiff's counsel assured the court that he was prepared to proceed without her. At the conclusion of the second day of trial, the court stated its decision on the record. However, a

judgment of divorce was not entered by the court until late November, 1995. In August, 1995, before the entry of the divorce judgment, plaintiff filed a motion for reconsideration pursuant to MCR 2.119(F), which the trial court denied.

The judgment of divorce awarded plaintiff \$50 per week in alimony for a period of three years, commencing in June, 1995. Defendant was also ordered to pay \$131 per week in child support for Kamari. Each party was awarded any pension benefits to which they were entitled, except that if it was determined that defendant had a pension with the National Electrical Benefit Fund or if defendant received a cash settlement as a result of his contribution to the fund, then such amount was to be divided equally between the parties. The trial court awarded plaintiff the marital home and the Chapel property, but awarded the Lyndon property to defendant. The 1986 Cadillac Seville and the 1987 Mercury Sable automobiles were awarded to plaintiff, while the 1986 Ford Ranger truck was awarded to defendant. With the exception of a table saw and video camera, which were awarded to defendant, each of the parties was to retain the personal property then in their respective possession.

Plaintiff first argues that the trial court erred in denying her motion for reconsideration pursuant to MCR 2.119(F). However, MCR 2.119(F) applies only to motions for reconsideration or rehearing of a decision *on a motion*. A review of plaintiff's motion and arguments indicates that plaintiff's motion essentially requested the trial court to either grant a new trial pursuant to MCR 2.611(A)(1)(h) or set aside the divorce judgment pursuant to MCR 2.612((C)(1)(a).

Pursuant to MCR 2.611(A)(1)(h), where a party's substantial rights are at stake, a trial court may grant a new trial for any of several reasons, including a ground listed in MCR 2.612. Pursuant to MCR 2.612(C)(1)(a), a trial court may relieve a party from a final judgment for mistake, inadvertence or excusable neglect. A trial court's decision on either motion is reviewed for an abuse of discretion. *Limbach v Oakland Co Rd Comm*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 186575 & 191204, issued 11/14/97), slip op p 3; *Phillips v Mazda Motor Mfg*, 204 Mich App 401, 411; 516 NW2d 502 (1994).

Plaintiff contends that she was entitled to have either a new trial or the judgment set aside because her inability to attend the last day of trial constituted excusable neglect and resulted in substantial injustice. Plaintiff argues that she was absent from the second day of trial because her son had an asthma attack and required emergency medical care. Plaintiff asserts that her absence prevented her from presenting testimony regarding her financial needs and her disability, and also prevented her from presenting testimony to rebut defendant's testimony. However, plaintiff testified on the first day of trial and has not specified any evidence that was not presented to the court because of her absence. Because plaintiff failed to demonstrate that her absence materially affected her substantial rights, the trial court did not abuse its discretion in declining to grant a new trial or to set aside the judgment on the ground of mistake or excusable neglect. *Limbach, supra*; *Phillips, supra*. Furthermore, we find no error in the trial court's mentioning that plaintiff's motion was filed approximately two months after the court's decision was rendered where plaintiff failed to establish any ground on which she was entitled to a new trial.

Next, plaintiff argues that the trial court erred in awarding her only \$50 per month in alimony. We disagree.

This Court reviews a trial court's dispositional ruling concerning an award of alimony to determine whether it was inequitable. *Magee v Magee*, 218 Mich App 158, 161-162; 553 NW2d 363 (1996). A court has the discretion to award alimony as it considers just and reasonable under the circumstances. MCL 552.23; MSA 25.103; *Magee, supra* at 162. The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. *Id.* Relevant factors for the court to consider include the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case. *Id.* Plaintiff argues that the trial court erred in its findings regarding several of these factors. We review a trial court's findings of fact for clear error. *Torakis v Torakis*, 194 Mich App 201, 203; 486 NW2d 107 (1992). A finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Berry v State Farm Mut Automobile Ins Co*, 219 Mich App 340, 345; 556 NW2d 207 (1996).

Plaintiff asserts that the trial court erred in finding that she received \$480 in pension benefits and \$113 in net rental income where she testified that she received \$349 in pension benefits and \$87 in net rental income. Although plaintiff testified that she received \$349 per month in pension benefits, the trial court relied on a document entitled "General Motors Hourly-Rate Employees Pension Plan," which indicated a net monthly benefit of \$479.27, to arrive at its approximate figure of \$480. Similarly, although plaintiff testified that her net monthly rental income from the Chapel property was \$87 (gross rent of \$325 minus the mortgage payment of \$238), defendant submitted a City of Detroit vendor receipt, which indicated that, as of April, 1994, plaintiff was receiving \$499 per month in rent. When confronted with the vendor receipt, plaintiff testified that the \$499 monthly rent "has changed in October." Faced with conflicting evidence, it appears that the trial court then approximated plaintiff's monthly net rental income at \$113, which was somewhere between the amounts alleged by plaintiff and defendant. We can not say that the trial court clearly erred in its calculation of plaintiff's income.

Next, plaintiff argues that the trial court erred when considering the parties' needs and ability to pay by comparing defendant's income after the deduction for taxes to plaintiff's income before the deduction for taxes. However, the trial court adjusted only defendant's salary for taxes. Plaintiff was not employed at the time of trial. Therefore, we find no error in the trial court's findings regarding the parties' incomes.

Next, plaintiff argues that the trial court failed to take into account the disparity in the parties' expenses. First, plaintiff maintains that the trial court failed to consider that she pays approximately \$325 per month in psychiatrist bills. However, plaintiff testified that she had not sought treatment since February or March, 1993, and she provided no evidence that she intended to seek further treatment in the future. Second, plaintiff contends that the trial court failed to consider defendant's testimony that he was able to share his household expenses with his live-in girlfriend. However, no testimony was elicited concerning the extent of such an arrangement. Furthermore, plaintiff was receiving \$275 per month in social security benefits for the parties' minor son, Kamari, and she was to further receive \$131 per

week in child support for Kamari. *Magee, supra; Parrish v Parrish*, 138 Mich App 546, 554; 361 NW2d 366 (1984). Therefore, we find no error on the court's consideration of the parties' expenses.

Next, plaintiff argues that the trial court failed to properly consider defendant's fault in causing the divorce. The relative value to be given to fault in a particular case is left to the trial court's discretion. *Hanaway v Hanaway*, 208 Mich App 278, 297; 527 NW2d 792 (1995). With respect to fault, the trial court in this case reasoned:

The issue of fault came up in the marriage and there's been some discussion, because the defendant had indicated that he could no longer have sex with his wife and is living with somebody else. I don't find that that's enough for fault. The reason for this could be just about anything. They both testified to the dissatisfaction with the other.

In light of the parties' testimony, we do not believe the court abused its discretion in not finding either party at fault for the purpose of the alimony determination.

Next, plaintiff argues that the trial court erred in finding that she had the ability to work. Specifically, the trial court found that, although plaintiff was disabled "to some extent," she testified that she had the ability to work. Plaintiff's testimony indicated that although she was on permanent disability, she was able to work "as long as the situation doesn't involve stress." Furthermore the trial court expressly stated that plaintiff's health and employability were primary factors in its decision to award alimony. We do not believe the trial court's findings regarding plaintiff's disability were clearly erroneous.

Next, plaintiff challenges the trial court's decision to award her the \$17,000 equity in the marital home to offset "what would have been a little more alimony." Plaintiff argues that, although the court awarded her the equity in the marital home, it failed to recognize that plaintiff lost approximately \$6000 equity in the Lyndon property, which was awarded to defendant. However, plaintiff was awarded a considerably larger share of the marital assets, including two vehicles and the bulk of the parties' personal property, valued at approximately \$12,000. We do not believe the trial court improperly considered the property settlement when making its alimony determination. *Magee, supra; Parrish, supra*.

Next, plaintiff argues that the trial court failed to consider the fact that plaintiff worked while defendant attended classes to become an electrician, and that plaintiff contributed \$10,000 from her worker's compensation settlement to defendant's construction business. However, plaintiff does not dispute the trial court's finding that the worker's compensation settlement, among other assets, was "spent between the parties." Moreover, defendant disputed plaintiff's claim that she paid for his education or supported him during that time. Therefore, we find no error in the trial court's findings.

In sum, we believe the trial court's award of alimony was fair and equitable. *Magee, supra* at 161-162.

Finally, plaintiff argues that she should have been awarded attorney fees. We disagree.

In a divorce action, attorney fees will be awarded only as necessary to enable a party to prosecute or defend a suit. *Hanaway supra* at 298. Attorney fees may be appropriate when the requesting party “has been forced to incur expenses as a result of the other party’s unreasonable conduct in the course of litigation. *Id.* A party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support. *Id.* We review a trial court’s decision regarding an award of attorney fees for an abuse of discretion. *Id.*

Considering the award of alimony and defendant’s child support obligation, the parties’ incomes were comparable. Furthermore, there was no indication that an award of attorney fees was necessary to enable plaintiff to prosecute this action or that plaintiff was forced to incur any additional expenses due to defendant’s conduct during the course of the litigation. Therefore, the trial court’s refusal to award attorney fees to plaintiff was not an abuse of discretion. *Id.*

Affirmed.

/s/ Peter D. O’Connell

/s/ Roman S. Gibbs

/s/ Michael R. Smolenski