

STATE OF MICHIGAN  
COURT OF APPEALS

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LAWRENCE J. STANKO,

Plaintiff-Appellee,

v

CATHERINE S. STANKO,

Defendant-Appellant.

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UNPUBLISHED

July 20, 2001

No. 220167

Oakland Circuit Court

LC No. 96-514076-DO

Before: Cavanagh, P.J., and Cooper and K.F. Kelly, JJ.

PER CURIAM.

Defendant-appellant Catherine Stanko appeals as of right from a May 19, 1999, Opinion and Order denying rehearing and reconsideration of an April 21, 1999, judgment of divorce. We affirm.

I. Spousal Support

Defendant argues that the trial court erred when, given the facts of the case, it limited defendant to spousal support of \$2,500 a month. Defendant suggests that the trial court should have granted her between \$5,000 to \$6,000 a month in spousal support so that the parties would have been left in economically equivalent positions upon divorce. We disagree.

An award of spousal support is in the trial court's discretion and what it considers to be just and reasonable. MCL 552.23; *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996). The primary purpose of spousal support "is to balance the incomes and needs of the parties in a way that will not impoverish either party." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). This court reviews an award of spousal support de novo, but will only reverse when the trial court's factual findings are clearly erroneous. *Id.*; *Demman v Demman*, 195 Mich App 109, 110; 489 NW2d 161 (1992). A finding is clearly erroneous when, after a review of the record, this Court is firmly convinced that a mistake has been made. *Moore, supra* at 654-655. A trial court's dispositional ruling is discretionary and should be upheld unless this Court is convinced it was inequitable under the circumstances. *Dragoo v Dragoo*, 223 Mich App 415, 429-430; 566 NW2d 642 (1997). "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." *Magee, supra* at 162.

After reviewing the record, we find that the trial court clearly set out all of the relevant factors in making its determination. See *id.* The trial court acknowledged that the parties had been married for twenty-nine years and that plaintiff was gainfully employed for most of this time.<sup>1</sup> The court went on to indicate the defendant was unemployed due to her present health problems and other limiting factors. Furthermore, the court took into consideration the ages of the parties and the fact that defendant relies upon plaintiff as her sole means of support. In regard to fault, the trial court noted that defendant made allegations of infidelity, that plaintiff rebutted these allegations, and that plaintiff alleged that defendant's behavior was responsible for the breakdown of the marriage.

We also note that in addition to the \$2,500 a month in spousal support, the trial court ordered plaintiff to provide defendant with \$10,000 towards the purchase of a new car and \$200 a month towards health insurance. According to the trial court, the \$2,500 took into consideration defendant's mortgage responsibility, insurance, utilities, home maintenance, entertainment, food, and miscellaneous expenses.

MCL 552.13 does not require that spousal support place the parties in an economically equivalent position, but instead states spousal support should provide for "suitable maintenance of the adverse party . . . ." Furthermore, defendant does not cite any relevant caselaw that requires spousal support to provide complete economic equality.

Moreover, the trial court's calculations indicate that defendant would receive approximately \$1,102,539 in additional assets from the divorce. While these assets are not all income producing (the house and cars), there is a significant amount that defendant could conservatively invest and use to support herself in addition to the spousal support award. See *Hanaway v Hanaway*, 208 Mich App 278, 296-297; 527 NW2d 792 (1995).

Defendant's argument that the trial court failed to consider plaintiff's fault in determining spousal support is not dispositive of the spousal support issue. Defendant states that the trial evidence established that plaintiff had "some type of relationship with another woman." However, we do not feel that the trial court clearly erred in failing to find against plaintiff on the issue of fault. The proofs presented during trial were not sufficient as to the nature and extent of plaintiff's relationships. Plaintiff also alleged fault on the part of defendant. The trial court noted both the plaintiff's and defendant's positions on fault and declined to make a finding either way. Fault is only one of the relevant factors in determining spousal support and it does not always mandate an award of spousal support. See *McDougal v McDougal*, 451 Mich 80; 545 NW2d 357 (1996); *Sparks v Sparks*, 440 Mich 141; 485 NW2d 893 (1992).

After carefully reviewing the record, we are not convinced that we would have reached a different result than that of the trial court.

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<sup>1</sup> We note that plaintiff is a stockbroker and that his salary is dependent upon market conditions.

## II. Property Division and Asset Valuation

Next, defendant makes several arguments that the trial court erred in its division of the property and valuations of several assets. We disagree.

A trial court must make finding of facts and dispositional rulings in a divorce action. *McDougal v McDougal*, *supra* at 87. On appeal, the trial court's factual findings are to be reviewed for clear error. *Moore*, *supra* at 654. Clear error exists when the appellate court is left with a definite and firm conviction that a mistake has been made. *Id.* at 654-655. "If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Id.* at 655. Factors for the trial court to consider in making its decision include, but are not limited to: (1) the length of the marriage, (2) contributions of the parties to the marital estate, (3) the parties' ages and health, (4) necessities and circumstances of the parties, (5) earning abilities of the parties, (6) past relations and conduct of the parties, and (7) general principles of equity. *McDougal*, *supra* at 89.

### A. Amgen stock

Defendant contends that the trial court erred in awarding plaintiff the Amgen stock shares and giving defendant only half of their total value at the time of trial. Specifically, defendant claims that the trial court should have considered the stock split, which occurred a month after the trial court's decision but before the entry of judgment. By not considering the stock split, defendant opines that the parties' property interests were unfairly divided. Lastly, defendant suggests that the trial court improperly subtracted the cost basis before determining the value of the stock. We disagree.

Assets earned by a spouse during the marriage, whether received during the existence of the marriage or after the judgment of divorce, are properly considered part of the marital estate. *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997). However, the inquiry as to whether an asset is part of the marital estate is distinct from the question of its valuation. *Id.* at 114 n 4. "For purposes of dividing property, marital assets are typically valued at the time of trial or at the time judgment is entered, though the court may, in its discretion, use a different date." *Id.* (citations omitted).

We find that the trial court did not commit clear error in its valuation and distribution of the Amgen stock. In response to defendant's motion for reconsideration, the trial court stated that it had split the accounts equally between the parties and had awarded half of the monetary value of the stocks, and not the shares of stocks, to defendant. Thus, the Amgen stock was properly considered marital property and valued by the trial court at the time of trial.

The trial court also has discretion about whether to divide the assets themselves or their monetary value. MCL 552.19; *Rogner v Rogner*, 179 Mich App 326, 330; 445 NW2d 232 (1989). The statute provides that:

Upon . . . a divorce from the bonds of matrimony . . . the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party by reason of the marriage, *or for awarding to either party the value thereof*, to be paid by either party in money. [MCL 552.19 (emphasis added).]

Given the fact that the trial court has discretion when to value marital assets, and that stock can either be divided by share or by monetary value, we do not find that the trial court committed any error. Moreover, since the monetary value of the Amgen stock was split equally between the parties at the time it was valued, we find the trial court's distribution to be equitable.

Defendant failed to cite any apposite authority that requires a court to value an asset using fair market value, as opposed to a cost basis valuation. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203, 94 NW2d 388 (1959).

#### B. Pension

Defendant claims that the valuation of plaintiff's pension plan, at \$36,016, was plain error and that the actual value at the time of trial was \$147,900. We disagree.

A May 4, 1998, letter from Paine Webber stated that the pension plan "accrued an *annual benefit* of \$36,016 payable for life beginning at age 65 in which you [plaintiff] are 100% vested. The *present value* of the \$36,016 is approximately \$147,900 using the GATT table . . . ." The trial court found that the pension plan had a present value of \$36,016 at the time of trial and that half of this would be distributed to defendant pursuant to a Qualified Domestic Relations Order (QDRO).

After reviewing the record, we do not find any clear error in valuation. The QDRO insures that defendant receives half of plaintiff's annual benefit of \$36,016.

#### C. PartnersPlus Account

Defendant argues that the trial court's valuation of the PartnersPlus account was in error because it considered the small, vested portion, despite the fact that plaintiff was fully vested before the trial court's December decision and its later judgment. Instead of using the \$29,373 that was vested at the time of trial, defendant argues the actual value to plaintiff, at the retirement age of 55, was \$178,496. We disagree.

Unvested retirement benefits are not required to be part of the marital estate in a divorce action. MCL 552.18(2) provides as follows:

(2) Any rights or contingent rights in and to *unvested* pension, annuity, or retirement benefits payable to or on behalf of a party on account of service credit accrued by the party during marriage *may* be considered part of the marital estate subject to award by the court under this chapter where just and equitable. [Emphasis added.]

The use of the term "may" in the statute is permissive and not mandatory. Therefore, a particular non-vested retirement benefit is not part of the marital estate unless the court so finds or the parties agree. MCL 552.18(2). There is also no evidence on the record that plaintiff planned to retire in the immediate future.

#### D. Tax Errors: PartnersPlus, Pension, 401(k), IRA, Amgen royalties, Stock Options

Defendant argues that the trial court incorrectly valued several of plaintiff's assets because it relied upon the calculations of plaintiff's expert that included tax ramifications of 35%, instead of at defendant's lower tax bracket.

The trial court valued these accounts using calculations made by plaintiff's expert witness at trial. A witness' credibility is an issue properly left to the factfinder. *Anton v State Farm Mutual Automobile Insurance Co*, 238 Mich App 673, 689; 607 NW2d 123 (1999). Defendant also failed to provide any relevant authority to support her position or adequately explain the uncertainty of the taxes. See *Wilson, supra* at 243. Nonetheless, it was undisputed that plaintiff *was* in the 35% tax bracket at the time of trial. Thus, it does not appear that the trial court engaged in mere speculation when it applied the 35% tax rate. *Nalevayko v Nalevayko*, 198 Mich App 163, 164-165; 497 NW2d 533 (1993).

#### E. Amgen Royalties

Defendant claims that the trial court merely accepted plaintiff's valuation of \$55,000 and did not consider the "stream of income" that he would receive until 2003 or 2005. As stated earlier, the credibility of a witness is properly left to the factfinder. *Anton, supra* at 689. Additionally, defendant's brief fails to cite any supporting authority or evidence that plaintiff's valuation was incorrect. As defendant failed to produce any evidence at trial to the contrary, we decline to address this issue on appeal. See *Great Lakes Division of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 425; 576 NW2d 667 (1998).

#### F. Failure to Consider Certain Assets

Defendant argues that the trial court failed to consider the \$3,000 Amgen royalty check that plaintiff had at the time of trial and the \$2,576 in cash that was remaining from the Midwest

Bank account. This argument lacks merit because the trial court considered the Amgen royalties and placed a \$55,000 value on them pursuant to an offer Pharmaceutical Partners, L.L.C., made to plaintiff to buy him out. Additionally, the trial court gave each party the funds present in each of their own checking accounts. Thus, we find no clear error.

### III. Attorney Fees

Lastly, defendant challenges the trial court's decision to deny her request for attorney fees. Defendant claims she is entitled to attorney fees because of the income disparity between the parties and the fact that plaintiff caused a good portion of defendant's attorney fees. We disagree.

This Court reviews a trial court's decision to award attorney fees for an abuse of discretion. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). Our Supreme Court maintains that an abuse of discretion occurs when a result is so inconceivable and violative of fact and logic that it evidences a perversity of will, a defiance of judgment or the exercise of passion or bias. *Department of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). If a party is unable to pay for attorney fees, then that party may recover reasonable attorney fees if the other party is able to pay. MCR 3.206(C)(1). However, in order to establish such a need, the party requesting the fees must allege facts sufficient to show that the party is unable to bear the expense of the action. MCR 3.206(C)(2). Furthermore, "a party may not be required to invade her assets to satisfy attorney fees when she is relying on the same assets for her support." *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993).

The trial court found that despite extensive litigation, neither party's conduct had risen to the level of "unreasonable" and noted that plaintiff had already paid \$11,000 of defendant's attorney fees. The trial court further stated that the distribution of the marital assets, with over one million being awarded to each party, would assist both parties in paying their attorney fees without unduly invading their assets for support. Additionally, we note that defendant was also awarded \$2,500 a month in spousal support, \$10,000 towards a car, and money for health insurance. Given the fact that defendant received spousal support and over one million dollars in assets, the record does not support a finding that defendant would be forced to rely upon her support assets to satisfy attorney fees.

Moreover, the record indicates that plaintiff has already paid for approximately \$11,000 of defendant's legal expenses. While plaintiff may have failed to be forthcoming with information on his assets, the record does not indicate that this amounted to significantly increased legal fees.<sup>2</sup> See *Daniels v Daniels*, 165 Mich App 726, 733; 418 NW2d 924 (1988).

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<sup>2</sup> The fact that defendant was represented by five different attorneys during the course of litigation may have added to her legal expenses.

Accordingly, we do not find that the trial court abused its discretion when it refused to grant attorney fees to defendant.

We affirm.

/s/ Mark J. Cavanagh  
/s/ Jessica R. Cooper  
/s/ Kirsten Frank Kelly