

STATE OF MICHIGAN
COURT OF APPEALS

VICKI A. SCHIRO,

Plaintiff-Appellee/Cross-Appellant,

v

WILLIAM A. SCHIRO,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

August 25, 2005

No. 252621

Ingham Circuit Court

LC No. 02-001934-DM

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

In this divorce action, defendant appeals as of right from a divorce judgment. Plaintiff cross-appeals the divorce judgment. We affirm.

Defendant argues that the trial court erred in its determination of the valuation of defendant's share in his oral surgery practice. The court concluded that the value of the business asset, as an ongoing concern, was \$1 million. Defendant argues that the court erred in this valuation because the defense expert testified that the total value, based on her data, was only \$705,000. Specifically, defendant argues that the court erred in not fully accepting the defense expert's estimated annual hours variable. We disagree that the court's valuation of defendant's business asset was in error.

We review a trial court's findings of fact regarding the valuations of particular marital assets for clear error. *Draggou v Draggou*, 223 Mich App 415, 429; 566 NW2d 642 (1997). A finding of fact is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* We give special deference to a trial court's findings when they are based on the credibility of the witnesses. *Id.* If the trial court's findings of fact are upheld, we must decide whether the dispositive ruling was fair and equitable in light of those facts. *Id.*

The only expert report presented to the court was that of the defense expert, Michelle Gallagher, CPA, ABV.¹ Gallagher's valuation of the subject business asset was based on two components: the value of the tangible assets and the value of the intangible assets, or the goodwill value. The parties agree that there is no dispute with regard to the valuation of defendant's fifty percent share of tangible assets at \$120,000. The dispute centers on the valuation of the intangible assets—specifically, the estimated annual hours variable, which reflects the number of procedures performed by defendant rather than the number of hours defendant actually spent in his office. Clarifying her method of calculation, Gallagher agreed that to arrive at her \$585,000 valuation for the intangible assets she took defendant's projected work hours and multiplied them by an estimated rate of collections to arrive at a total projected annual collection. She also agreed that she then subtracted the payroll taxes and other expenses and then projected her proposed value.

Regarding the amount of hours worked, Gallagher estimated that in 2001, defendant worked 2,750 annual hours. However, Gallagher explained that defendant began to reduce his hours in June 2002 as a result of his need to assume greater responsibility for his son. She estimated that in 2002, defendant worked 2,100 annual hours. Gallagher testified that the industry standard is 1,600 annual hours, but she explained that in projecting defendant's hours for 2003, she used a base of 1,320 hours given his new work schedule. However, Gallagher confirmed that her past valuations during prior testimony ranged as high as \$1,505,000 based on defendant's 2002 income of approximately \$950,000.

The court concluded that the value of the business asset, as an ongoing concern, was \$1 million. The court explained that this total took into account the \$120,000 valuation for the tangible assets and reflected a valuation of \$880,000 for the intangible assets. According to the court, it declined to accept Gallagher's valuation to the extent that she was basing her recommendation on defendant's claim that he would only be working 1,320 hours in the coming year. Rather, the court explained that it was not unreasonable to assume that 1,800 hours was a reasonable expectation of the business as an ongoing concern. According to the court, defendant's conduct belied his claim that he would be working significantly fewer hours in the coming year. The court stated that it could not simply ignore defendant's past work history. Further, the court pointed to the fact that the practice had hired a new doctor to replace the partner who left and that defendant was in the process of buying a \$775,000 house. The court determined that this evidenced "that he'll continue to work at least a full load." The court acknowledged that it could have used the national hourly average, but it took into account that defendant's work history was not average. The court explained that this history demonstrated that defendant was a hard worker who likely would continue to work hard.

"The trial court may, but is not required to, accept either parties' valuation evidence." *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988). Where marital assets are valued between divergent estimates, the trial court has great latitude in arriving at a final figure. *Id.* at

¹ Although plaintiff's expert, Daniel Warmels, CPA, testified before the court, his report was not presented for admission into evidence.

26. The trial court is in the best position to judge the credibility of the witnesses. *Id.* “[W]here a trial court’s valuation of a marital asset is within the range established by the proofs, no clear error is present.” *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994); see also *Kowalesky v Kowalesky*, 148 Mich App 151, 154-158; 384 NW2d 112 (1986). The court was in the best position to judge the credibility of Gallagher and defendant, and the court’s ultimate valuation was within the range established by the proofs. Therefore, the trial court did not clearly err in its valuation of this business asset.

In determining the income amount to utilize in calculating the child support and spousal support awards, the trial court averaged the reported incomes from defendant’s W-2 forms for the years 1999, 2000, and 2002 as adjusted, to arrive at the amount of \$820,852. Defendant next argues that the trial court erred in this determination because the court ignored the evidence pertaining to defendant’s actual current ability to earn income. More specifically, defendant asserts that the trial court erred by ignoring Gallagher’s testimony regarding defendant’s projected future income, and instead averaged defendant’s previous annual incomes. We disagree.

The trial court’s method of calculating defendant’s income was reasonable and in line with the Michigan child support guidelines. Section 2.01(B) of the Michigan Child Support Formula Manual (MCSF) incorporates the same definition of “income” as that used in § 2 of the Support and Parenting Time Enforcement Act, MCL 552.601 *et seq.* Both sources define “income” to be “[c]ommissions, earnings, salaries, wages, and other income due or to be due in the future to an individual from his or her employer and successor employers.” MCL 552.602(n)(i); 2003 MCSF § 2.01(B)(i).² However, the MCSF also takes into consideration that there are instances when a party’s income is variable due to various circumstances, including profit sharing and self-employment. 2003 MCSF § 2.01(C). In that event, “The use of three years’ income information is recommended where such variation exists.” 2003 MCSF § 2.01(C). Here, there can be no dispute that defendant’s income was variable given his occupation as a partner in an oral surgery firm. Therefore, it was proper for the trial court to base its finding of defendant’s income for the purposes of calculating support payments by averaging three years of defendant’s income.

Nevertheless, defendant contends that the trial court erred by not taking into account the effect of one of the practice’s partners leaving and defendant’s reduced work schedule. In regard to the effect of the partner’s departure, we find no clear error in the court’s determination that a professional with defendant’s experience would be able to rebuild the referral base that was allegedly lost due to the old partner’s departure. Regarding defendant’s claim that he would be voluntarily and markedly reducing his work schedule in the future, “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.” *Olson v Olson*, 189 Mich App 620, 622; 473 NW2d 772 (1991).

² We cite the version of the MCSF in effect at the time the judgment of divorce was entered. The definition has not changed in the most recent version of the MCSF.

Moreover, “[t]he final determination as to the appropriateness of imputation in a particular case is a judicial one.” 2003 MCSF § 2.10(B). Therefore, there was no clear error in the court’s conclusion that defendant was capable of sustaining an income similar to that of previous years.

With regard to spousal support, the trial court ordered that defendant pay monthly spousal support to plaintiff in the amount of \$15,000 until plaintiff’s death or until plaintiff reached the age of sixty-two, whichever occurred first. Defendant argues that in rendering this award, the trial court erred in placing disproportionate weight on the parties’ standard of living while ultimately ignoring that plaintiff was receiving a significant award in assets, including sizable income-earning assets. We disagree.

The trial court’s decision with regard to spousal support must be affirmed unless we are left with the firm conviction that the ruling was inequitable. *Olson v Olson*, 256 Mich App 619, 630-631; 671 NW2d 64 (2003). The main objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party, and spousal support should be based on what is just and reasonable under the circumstances of the case. *Id.* at 631. In making this determination, this Court has set forth a nonexclusive list of factors for a trial court to consider.³ *Id.* The record shows that the trial court was aware of these factors and referenced those that were relevant under the circumstances.

The court found that seventeen to eighteen years was a significant length of marriage and weighed in favor of spousal support for a period of years. Considering the parties’ ages, the court explained that both parties were at the stage of life where they would be looking to benefit from their hard work. With regard to the past relations and conduct of the parties, the court found that its review of defendant’s conduct weighed in favor of spousal support but that plaintiff’s conduct should be taken into consideration in determining whether the spousal support should be permanent or temporary.

Considering the abilities of the parties to work, the court noted that defendant’s average annual income over the past three years was \$950,000. And although plaintiff had been out of work for a significant period, the court found that she was capable of being retrained and reentering the workforce and imputed an annual income to her of \$42,000. However, the court found that the disparity in incomes weighed heavily in favor of a significant level of spousal support for an extended period of time. With regard to the source and amount of property awarded to the parties, the court noted that there were approximately \$3 million in assets to be divided between the parties, including real property and the value of defendant’s practice. The

³ The factors to be considered are: (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 spousal support; (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. *Olson, supra* at 631.

court explained that in some circumstances a court may try to equalize the incomes, but that here, the amount of assets to be awarded negated the need to equalize the level of income, and weighed in favor of at least limiting the length of time that spousal support would be awarded.

With regard to the present situation of the parties, the court found that plaintiff had invested many years in the marriage, and, based on the mutual agreement of the parties, she had an expectation of a comfortable lifestyle without working outside the home through the age of retirement. Therefore, the court concluded that the factor weighed heavily in favor of awarding spousal support until plaintiff's age of retirement, or the age of sixty-two. The court further found that defendant was a well-trained physician with a thriving practice who would be able live comfortably even while providing for his children and providing spousal support for an extended period of time. The court concluded that plaintiff's personal needs, as opposed to those related to the children, totaled approximately \$7,000 a month in order to maintain the household and maintain her standard of living. However, the court concluded that because the parties maintained a comfortable standard of living, plaintiff was entitled to spousal support in excess of what she needs.

The court weighed the parties' contributions to the joint estate equally, noting that defendant made significant contributions to the estate because of his earning capacity, and that plaintiff's contribution was the role of the primary caregiver and taking care of the household. Finally, without elaboration, the court concluded that both parties were equally at fault for the breakdown of the marriage relationship.

After considering all the factors, the court noted that, using defendant's previously mentioned average annual income of \$820,852, the relevant spousal support guidelines indicated a recommended award of \$13,645 per month, or \$163,738 a year, for 8.1 years. The court then explained that the guidelines were merely instructive and did not relieve the court of its duty to weigh all the relevant factors. Therefore, the court concluded that considering plaintiff's ability to work, her age, situation, and most critically her prior standard of living, plaintiff was entitled to \$15,000 per month until the age of sixty-two.

The trial court clearly considered the relevant factors and also took the plaintiff's property award into consideration. As the court stated, it could have awarded permanent support based on its finding that plaintiff had an expectation that she would be taken care of into retirement, but the court only ordered temporary support because it found that the support award together with the assets that she would receive would eventually generate sufficient income to support her in her retirement years. We are not left with the firm conviction that the ruling was inequitable. See *Olson, supra* at 630. Rather, the trial court balanced the incomes and needs of the parties in a way that was just and reasonable under the circumstances of the case. See *id.* at 631.

Defendant also argues that the trial court erred in its disposition of two transactions that occurred between defendant and his parents in 1995 and 1998. We disagree. We review the factual findings related to a property division in a divorce judgment for clear error. *Id.* at 622. A trial court's findings of fact are clearly erroneous only if on a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* at 629. If the factual findings are upheld, we must then decide whether the dispositional ruling was fair and equitable in light of the facts. *Id.* at 622, 629-630.

During trial, defendant argued that the marital estate was liable to his parents in the amount of \$210,000, as evidenced by two promissory notes. The first transaction was a \$100,000 investment made in 1995 related to a Paine Webber account. Defendant claimed that he needed the funds to meet the threshold balance requirement for the account. The second transaction was a \$110,000 investment made in 1998 related to the purchase of “jet kits.” The “jet kits” were assembly kits for four “War Bird” jet airplanes that cost approximately \$650,000. According to defendant, he borrowed \$110,000 from his parents to make up the difference that he needed to meet the purchase price. Despite defendant’s claim that plaintiff knew about the Paine Webber loan, plaintiff claimed that she had no knowledge of either transaction.

With regard to the 1995 transaction, the court indicated that it believed the transaction was a loan, but because the account was depleted, there was nothing left to be traced as a marital asset or debt. Further, the judgment of divorce states that plaintiff shall have no liability for repaying this note. Although defendant now suggests on appeal that the funds could be traced as a marital asset, he had the opportunity to present such evidence at trial but failed to do so. Indeed, the court stated in its ruling that it could not track the asset “because the money was missing. It’s gone. The market ate it up.” There was no error in the court’s conclusion or in its disposition where there was an absence of proof to trace the funds from the 1995 note.

With regard to the 1998 transaction, because the jet kits were still in defendant’s possession, the court considered them to be part of the marital estate. Accordingly, the court ordered that they be sold. However, the court acknowledged that the kits were purchased with “third-party money” as an investment by defendant’s parents, and ordered that they recover their investment, without interest, out of any proceeds generated by the court-ordered sale of the jet kits. Specifically, the court ordered that the first \$110,000 realized from the sale be repaid to defendant’s parents, and that any funds in excess of \$110,000 be divided equally between the parties. However, the court continued, “And, you know, as between these parties and the father and mother, that estate, who should bear the loss if there is a loss, these parties. So if they’re sold for less than \$110,000 that’s it. The father gets back less than \$110,000 and that’s all there is to it.”

Defendant argues that the court’s distribution with regard to the jet kits was inequitable because it does not accurately reflect the trial court’s statement that the *parties*, not just defendant, should bear any loss. We disagree. The court’s statements regarding who should bear the loss, albeit somewhat confusing, were later clarified, given the court’s conclusion that plaintiff was not obligated on the note presented by defendant, and that in the event of a loss on the sale, plaintiff would be held harmless for the deficiency. The court did not clearly err in its conclusion because there was no indication that plaintiff had any knowledge of the transaction between defendant and his parents. Plaintiff testified that she did not know that defendant was even purchasing the jet kits until the day before he sent out a check for their purchase. And there is no dispute that she did not sign the promissory note. The trial court did not clearly err in its disposition where there was no proof that plaintiff was obligated by the 1998 note.

In her cross-appeal, plaintiff argues that the trial court’s order that the \$110,000 invested by defendant’s parents for the purchase of the jet kits must be repaid from the proceeds of the sale of the jet kits is unfair and inequitable. According to plaintiff, the reality of this ruling means that, assuming the jet kits are sold for \$110,000 or more, plaintiff will, in effect, be paying \$55,000 to defendant’s father, who will get back one hundred percent of his principle

investment. Plaintiff offers that the equitable remedy would be to take the decreased value into consideration so the parents may also bear the burden of the decreased value. Defendant agrees that repayment of the 1998 loan should not be conditioned on the amount of proceeds received from the sale of the jet kits. But according to defendant, his parents should not have to bear the burden of any decreased value of the asset if the sale results in an amount less than \$110,000, and plaintiff should be equally obligated to repay the deficiency.

We are not left with the firm conviction that the court's handling of this matter was inequitable. See *id.* at 630-631. The court's ruling was rendered in as equitable a manner as possible given the parties' clearly discordant views on the responsibility of repayment of the funds to defendant's parents, and the court did its best to balance the equities of all parties involved.

Plaintiff also argues on cross-appeal that the trial court's order requiring payment of \$362,909 awarded to her to equalize the property distribution in installments of only \$2,500 per month, inclusive of statutory interest, is unfair. We disagree. After dividing the assets, the court awarded \$362,909 to plaintiff to equalize the discrepancy in the distribution between the parties. The court ordered that the amount could be paid in monthly installments of \$2,500, including statutory interest. The court also ordered that the award should be paid down from the proceeds received from the sale of certain assets, including the previously mentioned jet kits, an Albatross jet, a boat, and a hot air balloon. Plaintiff contends that her share from the sale of these assets would be only approximately \$110,000—far less than the total \$362,909 payment awarded by the court. Therefore, plaintiff objects to the fact that defendant would still owe her \$250,000, an amount that would take twelve years to pay off at \$2,500 per month. Plaintiff argues that defendant should be ordered to pay off the balance in no more than five years. According to plaintiff, given the low statutory interest rate,⁴ no incentive exists for defendant to promptly sell the assets.

In response, defendant points out that pursuant to the court's judgment, defendant's monthly payments to plaintiff include \$15,000 in spousal support, \$5,546.25 in child support, and \$2,500 in property settlement payments. This totals approximately \$23,000 per month. As stated, the court made the factual finding that defendant's annual income was \$820,852. Assuming a 41.1% tax bracket, inclusive of both federal and state taxes, defendant's after-tax income is reduced to approximately \$483,481. This equates to a monthly income of \$40,920. Thus, defendant's payments to plaintiff already total over fifty percent of defendant's monthly net income. Under plaintiff's proposed payment schedule, defendant's total monthly payments to plaintiff would total over sixty percent of his monthly after-tax income. Under these circumstances, we are not left with the firm conviction that the court's disposition with regard to property settlement payments was inequitable. See *id.* at 630-631.

Finally, we reject defendant's argument that the trial court abused its discretion in making a sua sponte award of attorney fees to plaintiff. An objection to the reasonableness of an

⁴ 3.603 percent at the time the judgment of divorce was entered.

attorney fee award may not be raised for the first time on appeal. *Jansen, supra* at 173. Therefore, we need not consider this challenge because defendant failed to object below. *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2d 394 (1992). We nevertheless conclude that the trial court appropriately exercised its discretion to award fees where defendant's unreasonable conduct of violating the court's temporary restraining order caused plaintiff to incur additional legal fees. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992); *Thames v Thames*, 191 Mich App 299, 310; 477 NW2d 496 (1991). Moreover, the court was permitted to base the award on its knowledge of the lower court file and the local rates charged by family practitioners. See *Zdrojewski v Murphy*, 254 Mich App 50, 73-74; 657 NW2d 721 (2002); *Milligan, supra* at 671.

We affirm.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly