

STATE OF MICHIGAN
COURT OF APPEALS

KAREN M. HOBBS,

Plaintiff-Appellee/Cross-Appellant,

v

ANDREW S. HOBBS,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED

June 7, 2012

No. 304104

Oakland Circuit Court

LC No. 2009-765874-DM

Before: K. F. KELLY, P.J., and WILDER and BOONSTRA, JJ.

PER CURIAM.

Defendant Andrew S. Hobbs appeals as of right from a judgment of divorce. Plaintiff Karen M. Hobbs cross appeals, challenging the trial court's refusal to award all of her requested attorney fees. We affirm, except to the extent, as described below, that we vacate the trial court's order and remand for clarification with respect to the South Carolina property.

Defendant first argues that the trial court's award of spousal support to plaintiff in the amount of \$3,000 a month constituted an abuse of discretion where it was not limited to a fixed number of years for rehabilitative purposes. We review a trial court's award of spousal support for an abuse of discretion, but review the trial court's factual findings for clear error. *Berger v Berger*, 277 Mich App 700, 726-727; 747 NW2d 336 (2008).

The trial court awarded plaintiff spousal support of \$3,000 a month until her death or further order of the court. Although the court did not limit the award to a fixed number of years, it also did not foreclose later modification. On the contrary, the support is subject to future modification as the parties' circumstances change, consistent with MCL 552.28. See *Staple v Staple*, 241 Mich App 562, 565; 616 NW2d 219 (2000).

Defendant suggests that the trial court was disproportionately influenced by the fault ascribed to him, including "non-existent acts of domestic violence," in awarding spousal support. However, the record reveals that the trial court did not refer to domestic violence in its factual findings related to spousal support, but rather only mentioned defendant's infidelity. In doing so, the trial court did not place undue emphasis on the issue of defendant's fault or make fault a primary issue. Rather, the trial court's conclusion that plaintiff was entitled to permanent modifiable spousal support was made after considering all of the relevant factors (which

defendant acknowledged it to have considered), including, but not giving undue weight to, fault. *Berger*, 277 Mich App at 726-727.

To the extent that the trial court may have considered (while not referencing) allegations of domestic violence, its assessment essentially would have amounted to one of credibility, as between plaintiff and defendant. The trial court “ha[d] the best opportunity to view the demeanor of the witnesses and weigh their credibility.” *Stoudemire v Stoudemire*, 248 Mich App 325, 339; 639 NW2d 274 (2001). This Court is required to give deference “to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” MCR 2.613(C).

The trial court’s findings with regard to spousal support are supported by the record and, therefore, are not clearly erroneous, and the court’s dispositional ruling is fair and equitable in light of the facts. *Id.* at 727.

Defendant next argues that the trial court lacked jurisdiction to effectively grant plaintiff’s parents an interest in the parties’ South Carolina property. In that regard, we note that “[a]bsent allegations of fraud, the trial court in a divorce action may only adjudicate the rights of the spouses whose marriage is being dissolved.” *Reed v Reed*, 265 Mich App 131, 157-158; 693 NW2d 825 (2005). “So, in a divorce action, the trial court lacks the authority to compel a party to convey property or a property interest to a third person . . . or to adjudicate claims of third parties.” *Id.* at 158 (internal citations and quotations omitted); see also *Yedinak v Yedinak*, 383 Mich 409, 415; 715 NW2d 706 (1970). However, the trial court in a divorce action is permitted to make a factual determination that money owed to third parties constitutes marital debt for which both parties share liability, and to allocate that debt between the parties as part of the property division. See *Lesko v Lesko*, 184 Mich App 395, 401; 457 NW2d 695 (1990), overruled in part on other grounds, *Booth v Booth*, 194 Mich App 284, 290 (1992).

Here, the trial court found that “[t]he value of the home, less Plaintiff’s parents’ interest, if any, as well as its contents, are marital assets.” Based on that finding, the trial court ordered that “[t]he home in South Carolina shall be sold, as the parties stipulated, and the proceeds remaining after [p]laintiff’s parents interest, if any, is considered shall be divided among the parties with 55% to [p]laintiff and 45% to [d]efendant” and that “[p]laintiff’s parents . . . shall first receive the equivalent of £80,000 GBP from the proceeds of the sale. Thereafter, the parties shall divide any/all remaining proceeds from the sale of the home, with [p]laintiff receiving Fifty-Five (55%) percent of any such proceeds and [d]efendant receiving Forty-Five (45%).” Plaintiff’s parents were not named title holders to the South Carolina property, and did not possess any written or recorded liens on the property.

We are unable to determine on the record before us whether the trial court made a determination of the nature or extent of the parents’ “interest, if any,” in the South Carolina property, or whether that interest constituted marital debt. We therefore vacate that portion of the trial court’s order, and remand for clarification, including as to whether all or part of the £ 80,000 contributed to the purchase price by plaintiff’s parents was marital debt and, if so, the proper allocation of that debt between the parties.

Defendant next argues that the trial court abused its discretion by ordering him to pay for his son’s private school tuition. We review de novo whether a trial court properly reached its

determination of child support within the framework of the Michigan Child Support Formula (MCSF) or the statutory deviation criteria set out in MCL 552.605. *Stallworth v Stallworth*, 275 Mich App 282, 283-284; 738 NW2d 264 (2007). We review for clear error a trial court's factual findings underlying its determination of child support and review for an abuse of discretion a trial court's discretionary rulings that are permitted by statute or the MCSF. *Id.* at 284.

MCL 552.602(ee)(i) provides that “[s]upport may include payment of . . . educational expenses.” Private school tuition expenses are one of the many factors that a court may consider in awarding child support. See *Edwards v Edwards*, 192 Mich App 559; 481 NW2d 769 (1992), and *Arndt v Kasem*, 135 Mich App 252; 353 NW2d 497 (1984). For purposes of child support, the trial court found that plaintiff's income was \$65,000 a year, whereas defendant's income was \$264,614 a year. Pursuant to the MCSF, the trial court ordered defendant to pay plaintiff \$1,295 a month in child support. The trial court also ordered that the child was to remain in private school and that defendant should continue to pay the child's tuition. Defendant contends that the trial court's child support order “is tantamount to a deviation” from the MCSF. When a trial court enters a deviating order, it must set forth in writing or on the record why following the formula would be unjust or inappropriate. *Ghidotti v Barber*, 459 Mich 189, 191; 586 NW2d 883 (1998).

Even if we accept defendant's position in this regard, we find, contrary to Defendant's contention, that the trial court did set forth sufficient reasons for deviating from the child support formula. The record reveals that the child's psychologist strongly recommended that the child continue in private school to maintain stability and to provide support due to his academic struggles. Plaintiff testified that the parties' son “loves” his school and thought that it would be “drastic” to take him out. Defendant did not think it was important for the child to continue there because he was struggling academically, and defendant wanted to review the issue annually based on the child's performance and comfort level. In defendant's opinion, the tuition was a family commitment that needed to be reviewed on an annual basis. The trial court's factual finding that the child should remain in private school is supported by the testimony of plaintiff and the child's psychologist and, therefore, is not clearly erroneous. *Stallworth*, 275 Mich App at 284. The trial court recognized the importance of maintaining consistency and continuity for the child during the divorce proceedings, and staying enrolled in the same school furthered this goal. Further, the trial court's factual finding that defendant could afford to pay the child's private school tuition is supported by the record and, therefore, is not clearly erroneous. *Id.* Under the circumstances, the trial court did not err in ruling that defendant should continue to pay the child's private school tuition.

Defendant argues that the trial court's decision deprived him of his legal right, as joint custodian, to make educational decisions on behalf of his child. However, the record does not indicate that a present conflict between the parties over their child's education existed, only that defendant wished to review the child's continuing enrollment in private school and on an annual basis based on the child's performance, comfort level, and affordability. MCL 552.17(1) affords defendant the opportunity to petition the court to remove the child from private school or require plaintiff to pay a portion of the tuition. This accommodates defendant's desire to review the issue on an annual basis or as needed if there are changes in the child's performance or comfort level, or defendant's ability to afford the tuition.

Lastly, the parties challenge the trial court's decision to order defendant to pay 65 percent of plaintiff's attorney fees, which amounted to \$25,862. On appeal, defendant argues that the trial court erred in awarding plaintiff any attorney fees, whereas plaintiff argues on cross-appeal that the trial court erred by failing to award \$39,789, the full amount of attorney fees she requested. MCL 552.13 authorizes the award of attorney fees in actions for divorce or separation. We review a trial court's decision to award attorney fees in a divorce action for an abuse of discretion. *Woodington v Shokoohi*, 288 Mich App 352, 369; 792 NW2d 63 (2010). The findings of fact on which the trial court bases its decision are reviewed for clear error. *Id.*

Attorney fees in a divorce action are not recoverable as of right, but are to be awarded where necessary to preserve the party's ability to maintain or defend the action. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). A party should not be required to invade assets to satisfy attorney fees when those same assets are relied upon for support. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995), lv den 451 Mich 874 (1996).

In awarding attorney fees in the instant case, the trial court found that the defendant had adequate financial resources from his employment and the property settlement to pay 65 percent of plaintiff's attorney fees, and implicitly found that plaintiff could afford to pay 35 percent of her attorney fees. These findings are supported by the record and are not clearly erroneous. *Woodington*, 288 Mich App at 369. The parties had been married for 13 years. Plaintiff earned \$65,000 a year and that defendant earned \$264,614 a year. The court found that defendant had adequate financial resources from his employment and the property settlement to pay plaintiff's attorney fees, and noted that defendant did not contest their reasonableness. The record shows that plaintiff would be unable to bear the expenses of the action (which amounted to nearly two-thirds of her yearly income) without invading assets relied upon for support. Because the trial court's decision regarding attorney fees is supported by the record and is within the range of reasonable and principled outcomes, it does not constitute an abuse of discretion. *Id.*; *Smith v Smith*, 278 Mich App 198, 206; 748 NW2d 258 (2008).

Defendant's assertion that plaintiff is not entitled to any attorney fees because she did not seek them during the pendency of the action is in error, because MCR 3.206(C)(1) specifically provides that a party may request attorney fees "at any time." Further, defendant's assertion that plaintiff is not entitled to attorney fees because defendant did not engage in misconduct, see MCR 3.206(C)(2)(b), is also in error, because MCR 3.206(C)(2)(a) alternatively allows for attorney fees if a party alleges facts sufficient to show that the party is unable to bear the expenses of the action, and that the other party is able to pay, which plaintiff did. Plaintiff asserts that the trial court should have ordered defendant to pay all of her attorney fees because she had to pay other bills, including attorney fees incurred at trial, mediation fees, and her stock expert. However, the trial court's determination that plaintiff could afford to pay 35 percent of her attorney fees is not clearly erroneous.

The trial court's order is affirmed in all respects apart from the portion of the order dealing with the South Carolina property. With respect to that property, the order of the trial court is vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Kurtis T. Wilder

/s/ Mark T. Boonstra