

Court of Appeals, State of Michigan

ORDER

JAMES D MOONEY V MURIEL J MOONEY

Docket No. 258687

LC No. 00-000233-DM

Joel P. Hoekstra
Presiding Judge

William C. Whitbeck

Brian K. Zahra
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued April 25, 2006 is hereby VACATED. A new opinion is attached to this order.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAY 25 2006

Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

JAMES D. MOONEY,
Plaintiff-Appellee,

UNPUBLISHED
April 25, 2006

v

MURIEL J. MOONEY, a/k/a MARIEL DE
SOLEIL,

No. 258687
Washtenaw Circuit Court
LC No. 00-000233-DM

Defendant-Appellant.

Before: Hoekstra, P.J., Whitbeck, C.J., and Zahra, J.

PER CURIAM.

In this action for divorce, defendant appeals as of right the trial court's orders regarding child and spousal support and denying her request for attorney fees following remand by this Court. We affirm, but remand this matter for entry of an order requiring that the support credit paid by defendant in accordance with the judgment of divorce be refunded to her.

I

Defendant first argues that the trial court violated the law of the case doctrine and abused its discretion by failing to develop or otherwise accept additional proofs offered by her on remand.¹ We disagree.

Plaintiff is correct that “[a] ruling by this Court binds the trial court on remand, pursuant to the law of the case doctrine.” See *Sumner v Gen Motors Corp (On Remand)*, 245 Mich App 653, 661; 633 NW2d 1 (2001). Thus, under the law of the case doctrine, “a trial court may not take any action on remand that is inconsistent with the judgment of the appellate court.” *Kalamazoo v Dep’t of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475

¹ We reject plaintiff's assertion that defendant waived appellate review of this issue by agreeing at the hearing on her motion for evidentiary hearing and to offer proofs that the trial court need only consider the parties' income tax returns. Although defendant ensured the trial court that she would provide the returns requested, it cannot be said that she agreed or otherwise acquiesced to the trial court's refusal to accept additional proofs.

(1998); see also *McCormick v McCormick*, 221 Mich App 672, 679; 562 NW2d 504 (1997) (“[t]he power of a lower court on remand is to take such additional action as law and justice require that is not inconsistent with the judgment of the appellate court”). The question whether the trial court has complied with a prior order of this Court is a question of law reviewed de novo on appeal. *Sumner, supra* at 661-662; see also, e.g., *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996). A trial court’s decision to limit the evidence to be presented on an issue is, however, reviewed for an abuse of discretion. See, e.g., *46th Circuit Trial Court v Crawford Co*, 266 Mich App 150, 171-172; 702 NW2d 588 (2005).

In this Court’s prior opinion, the panel found that “the trial court’s conclusion that defendant was able to obtain employment as a school teacher at a salary of \$26,000 was [both inequitable and] not supported by the evidence,” and thus reversed the trial court’s imputation of income to defendant and remanded the matter for new determinations of the parties’ incomes and associated child and spousal support obligations, and to decide “whether defendant is entitled to attorney fees in light of these new findings.” See *Mooney v Mooney*, unpublished opinion per curiam of the Court of Appeals, issued November 13, 2003 (Docket No. 235187), slip op at 3-4. In doing so, however, the panel did not require that the trial court receive additional evidence before making these determinations. Contrary to defendant’s assertion, the panel’s statement in its order denying reconsideration that defendant “should present any new evidence of plaintiff’s income to the trial court,” see *Mooney v Mooney*, unpublished order of the Court of Appeals, entered February 4, 2004 (Docket No. 235187), was merely a response to defendant’s attempt to enlarge the record for purposes of reconsideration and in no way bound the trial court to conduct an evidentiary hearing or otherwise receive additional evidence. The trial court did not violate the law of the case doctrine by failing to accept additional proofs offered by defendant on remand. *Sumner, supra*.

Nor did the trial court abuse its discretion in limiting the proofs on remand to the tax returns filed by the parties for tax years 2001, 2002, and 2003. As recognized by defendant both on remand and in her brief on appeal, a party’s net income for purposes of determining child support “should be determined from actual tax returns whenever possible.” See Michigan Child Support Formula Manual, § II (H) at 7 (West, 2001). Moreover, by the time of remand, the trial court had already presided over a two-day trial during which the parties’ familial and financial circumstances were extensively litigated. Thus, with the exception of the parties’ incomes during the period following trial, the court was intimately familiar with the circumstances to be considered in determining an appropriate amount of child and spousal support. Under such circumstances, it cannot be said that there was “no justification or excuse” for the trial court’s ruling. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999). The trial court did not, therefore, abuse its discretion in limiting the proofs to be offered by the parties on remand.

Defendant also argues that the trial court erred in relying on a number of “unsubstantiated” statements by plaintiff in his brief to the trial court on remand. Review of the trial court’s opinion and order after remand, however, reveals that of the 14 statements cited by defendant in her brief on appeal, the trial court clearly relied on only one, i.e., that \$3850 of the interest and dividends reported by plaintiff as income on his 2001 tax return had been earned before and included in the equal division of marital estate, and thus should not be considered by the court in making its new support determinations. In determining child and spousal support on

remand, the trial court indicated that it was “persuaded” that the income at issue had been divided in the property settlement. This Court’s review of the trial court’s finding in this regard is limited to clear error, *Sparks v Sparks*, 440 Mich 141, 149-150; 485 NW2d 893 (1992), the burden of which to show is on defendant, who must demonstrate to this Court, on the basis of all the evidence, that there is a clear and definite mistake, *Beason v Beason*, 435 Mich 791, 804-805; 460 NW2d 207 (1990). As explained below, defendant has failed to meet her burden in this regard.

Contrary to defendant’s assertion, there is support for the trial court’s conclusion that the income at issue had been divided in the property settlement. The 2001 income tax return filed by plaintiff reports taxable interest and dividends totaling \$6141. The judgment of divorce, which was not entered by the trial court until mid-May 2001 and provided for an equal division of the parties’ assets, renders support for the trial court’s conclusion that a portion of the interest and dividends reported by plaintiff for that year were included in the division of property. Because there was support for the conclusion that a portion of the interest and dividend income was included in the undisputed property division, the trial court did not clearly err in reaching this conclusion. *Sparks, supra; Beason, supra* (review of a trial court’s findings of fact in a divorce case is limited to clear error); see also, *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002) (property division need not be mathematically equal to be equitable). Thus, defendant has failed to show that, on the basis of all of the evidence, the trial court’s finding was clearly erroneous. *Beason, supra*.

II

Defendant next argues that the trial court erred in failing to examine on remand the “support credit” paid by her to plaintiff under the judgment of divorce. We agree.

As previously noted, “[a] ruling by this Court binds the trial court on remand, pursuant to the law of the case doctrine.” *Sumner, supra*. In a footnote to its conclusion “that it was inequitable as a matter of law for the trial court to impute income to defendant,” the prior panel stated:

As a result of the income imputed to defendant, the May 18, 2001 judgment of divorce orders a credit to plaintiff for child support paid from November 15, 2000 until entry of the judgment, pursuant to a Consent Order entered by the trial court on October 27, 2000. *This credit is also inequitable.* [*Mooney, supra*, slip op at 2 n 1 (emphasis added)].

Although the panel did not expressly direct the trial court to consider the support credit on remand, its statement that the credit was also “inequitable” required consideration of the credit by the trial court on remand. *Kalamazoo, supra*. Indeed, the credit was calculated on the basis of support obligations squarely rejected by the panel and which, on remand, resulted in an

arrearrage owed to, rather than by, defendant. Accordingly, we remand this matter for entry of an order requiring that the entirety of the support credit paid by defendant be refunded.²

III

Defendant also argues that the trial court's award of spousal support was premised on erroneous findings of fact that render the award inequitable. This Court reviews a trial court's findings of fact in relation to spousal support for clear error. *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). If the trial court's findings are not clearly erroneous, its "decision regarding alimony must be affirmed unless the appellate court is firmly convinced that it was inequitable." *Olson v Olson*, 256 Mich App 619, 630; 671 NW2d 64 (2003). After review of the record, we are unable to conclude that the findings challenged by defendant are clearly erroneous, or that the trial court's decision regarding spousal support is inequitable.

The objective of an award of spousal support "is to balance the incomes and needs of the parties in a way that will not impoverish either party." *Id.* at 631. Thus, in setting an award of spousal support a trial court should consider such factors as "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 v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996). With respect to such factors, defendant challenges only the trial court's findings regarding the ability of the parties to work and their respective earning capacities. Specifically, defendant argues that there was no support for the trial court's conclusion on remand that defendant "was not working equally as hard" as plaintiff. However, the trial court did not, as defendant asserts, base its determination of spousal support on a conclusion that defendant's efforts to generate income for herself were somehow inferior to that of plaintiff. Rather, the trial court simply ruled that because "both parties should be working equally as hard to earn an income," it would not consider overtime income earned by plaintiff when determining the amount of spousal support to be awarded in this case.

Defendant also argues, however, that the trial court erred as a matter of law in deciding not to consider overtime income earned by plaintiff for purposes of determining the appropriate amount of spousal support. Defendant nonetheless correctly notes that there is no authority in this state requiring that a trial court consider historical overtime pay when determining an award of spousal support. Rather, the decision whether and to what extent a party should be awarded spousal support ultimately rests "on what is just and reasonable under the circumstances of the case." *Olson, supra*. Here, the trial court concluded that defendant was entitled to spousal support for a period of six years following entry of the May 18, 2001 judgment of divorce and, in doing so, declined to impute any income to defendant for that period. On the basis of these

² Although not raised in her statement of questions presented, defendant, in her request for relief, asks that any remand of this matter be ordered before a different judge for the reason that the current judge "will simply continue his disagreement with this Court's prior rulings." However, because we find that this matter need only be remanded for the ministerial task of entering an order requiring that the support credit previously paid by defendant be refunded, remand before a different judge is not necessary.

conclusions, the trial court awarded defendant an average of approximately \$14,000 in annual spousal support for six years, together with approximately \$13,000 in annual child support payments for the period between 2001 and 2003, and \$6800 from 2004 until support for the parties' youngest child is no longer required.³ In addition to this support, defendant was awarded the marital home, which was agreed by the parties to be worth approximately \$175,000 at the time of trial and against which there was no mortgage. Defendant was also awarded a vehicle for which the parties had prepaid the entire lease. With respect to her age, health, and ability to work, although now more than fifty-five years of age, it is not disputed that defendant holds a bachelor degree and possesses no physical or mental impediment affecting her ability to work. *Magee, supra*. Moreover, regarding her financial needs defendant expressly testified at trial that she lived "very simply" and wanted only "to be able to have some time to invest into a career" The support ordered by the trial court, when considered in conjunction with the property award and defendant's ability to herself work during this period, will permit her to accomplish this goal in a just and reasonable manner under the circumstances of this case. *Olson, supra*. We are not, therefore, firmly convinced that the trial court's award of spousal support was inequitable. *Olson, supra* at 630.

IV

Defendant next argues that the trial court erred by denying her request for trial and appellate attorney fees. We disagree.

Although no party has an absolute right to attorney fees in a divorce action, attorney fees in a divorce action may be awarded if the record supports a finding that the party requesting the award is unable to bear the expense of the litigation. *Ianitelli v Ianitelli*, 199 Mich App 641, 645; 502 NW2d 691 (1993); see also *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). "Attorney fees also may be authorized 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." *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). Whether such fees are warranted is, however, a matter of discretion for the trial court and will not be reversed on appeal absent an abuse of that discretion. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of bias rather than the exercise of discretion." *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998).

Because a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support, *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993), a trial court's decision regarding an award of attorney fees in a divorce action should reflect the extent to which its award of spousal support leaves the parties with assets and income comparable to one another, *Hanaway, supra* at 298-299. Here, the trial court declined to award attorney fees to defendant because "[t]he parties were awarded comparable assets through

³ The decrease in child support in 2004 was the result of the parties' shared physical custody of their youngest child, Catherine, beginning in February of that year.

the undisputed division of property made earlier in this matter.” The court further concluded that its award of spousal support provided defendant with an income “comparable enough that she will have the ability to pay her own attorney fees.”

Defendant does not challenge the distribution of the marital estate, which, as previously noted, divided the parties’ assets equally. Rather, defendant argues that her share of the marital estate, specifically, the marital home, lacks the liquidity necessary to enable her to pay her attorney fees. Defendant also argues that plaintiff’s greater income provides him the ability to pay, while she would be required to invade the assets awarded her in dividing the marital estate, and that the trial court therefore abused its discretion in denying her request that plaintiff be required to pay the attorney fees incurred by her in this action. However, while the relative liquidity of the assets received by the parties is properly considered in determining whether to award attorney fees, *Kurz v Kurz*, 178 Mich App 284, 297-298; 443 NW2d 782 (1989), it is not reasonable to conclude that a home valued at nearly \$175,000, with no attendant mortgage, is inherently illiquid. Moreover, insofar as defendant requested that she receive the marital home as part of the property disposition, she will not now be heard to complain of a problem with its liquidity.

Furthermore, while it cannot be disputed that plaintiff earns a comparatively larger income, the mere fact that the opposing party has the ability to pay is not alone sufficient to warrant an award of attorney fees in favor of the requesting party. Rather, as noted, whether an award of attorney fees in a domestic relations matter is appropriate is a function of both the relative incomes of the parties, as well as the comparative nature of the estates awarded in the action. *Hanaway, supra*.

Additionally, unlike *Maake, supra*, where the party requesting attorney fees was not awarded spousal support and thus would have been required to invade the assets upon which she was relying to support herself to satisfy her attorney fees, defendant is being provided support by way of monthly alimony payments over the course of six years and, as discussed earlier, this award is sufficient to support her needs. Thus, if defendant is required to invade the principle associated with her home, she is not invading assets needed for support. *Id.* Accordingly, there is no basis from which to conclude that the trial court’s award of marital property and spousal support, when combined with defendant’s ability to herself earn income, was insufficient to provide for defendant’s needs such that she is unable to satisfy her attorney fees without invading assets necessary for her support. Accordingly, we are not persuaded that the trial court abused its discretion by refusing defendant’s request for attorney fees. *Schoensee, supra*.

V

Defendant also argues that the trial court erred in its determination of child support. Specifically, defendant contends that the trial court relied on erroneous or otherwise unsupported conclusions in determining plaintiff’s income for purposes of calculating his child support obligation. Again, we disagree.

As with all findings of a trial court relative to a divorce action, a trial court’s findings regarding child support are reviewed for clear error and the party appealing the support order bears the burden of showing that a mistake has been made. *Beason, supra*. In challenging the trial court’s findings regarding plaintiff’s income for purposes of determining child support,

defendant first argues that the court erroneously relied on plaintiff's unsubstantiated claim that \$3850 of the interest and dividends reported by plaintiff as income on his 2001 tax return had been earned before and included in the equal division of marital estate, and thus should not be considered by the court in making its new support determinations. However, as previously discussed, because there is support for the trial court's conclusion that the income at issue had been divided in the property settlement, the court did not clearly err in declining to consider that income for purposes of determining child support. *Id.*

Defendant also argues that a number of the "business expenses" deducted by plaintiff from consulting work income earned by him in 2001 were not legitimate, and that the trial court should, therefore, have included an additional \$1800 as income earned by plaintiff for purpose of calculating his child support obligations for that year. However, even assuming that this income was erroneously excluded from the trial court's support determination, defendant acknowledges that the trial court also erroneously included nearly \$5000 as income earned by plaintiff during 2003. Because these asserted errors, when combined, are harmless as to defendant, they do not justify "disturbing" the trial court's support order. MCR 2.613(A).

Defendant further argues that the trial court erroneously accepted plaintiff's "unsubstantiated" claim that the parties' youngest child, Catherine, had lived with the parties equally since September 2003 and that any award of child support for that period should be based on this reality. However, while it appears that defendant is correct that the trial court accepted the custody situation relayed by plaintiff, it is clear that the court declined to consider that premise for purposes of calculating support absent defendant's stipulation to reflect this reality. Any error in the trial court's finding was thus harmless as to defendant and there is, therefore, no basis for disturbing the court's order of support on appeal.⁴ *Id.*

VI

Defendant next argues that the trial court abused its discretion in permitting plaintiff to pay the arrearage of support created by its determinations on remand over time. Defendant further argues that, because the trial court is without discretion to modify the mandatory statutory surcharge imposed against past due support payments, the trial court also erred as a matter of law in ordering that surcharges against the arrearage not accumulate. We do not agree.

A support arrearage must be paid within a reasonable amount of time, to be set within the discretion of the trial court. See *Hoke v Hoke*, 162 Mich App 201, 208; 412 NW2d 694 (1987); see also *Hakken v Hakken*, 100 Mich App 460, 466; 298 NW2d 907 (1980). Here, the trial court granted plaintiff's request to pay his arrearage in equal installments over a period approximately 32 months. In challenging the trial court's decision in this regard, defendant asserts that the trial

⁴ Although defendant also asserts that the trial court's support determination does not "comport" with the Michigan Child Support Formula Manual, she has failed to support this assertion with any argument as to how the determinations fail to correspond with the manual. Accordingly, she has waived any review of this claim on appeal for failure to "adequately prime the [appellate] pump." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

court abused its discretion by permitting an extended payment plan in the absence of any evidence or finding regarding plaintiff's ability to pay the arrearage in a more immediate manner.⁵ However, while we agree that a party's ability to pay is relevant to the determination whether, and to what extent, the party should be permitted to pay an arrearage of support over time, defendant concedes that there is no authority requiring that a trial court consider such ability in reaching that determination. Nonetheless, because the plan approved by the trial court is reasonable under the circumstances of this case, and provides for payment of the arrearage within a reasonable time, we find no abuse of discretion by the trial court in permitting and approving the plan proffered by plaintiff. *Hoke, supra*. Indeed, as found by the trial court, the arrearage at issue here did not result from any untoward conduct by plaintiff, against whom there is no allegation of a prior failure or unwillingness to pay his obligations of support. Moreover, the plan provides for full repayment of the arrearage within the period ordered by the trial court for spousal support, i.e., until May 2007, and in an amount that increases plaintiff's already substantial annual obligation to defendant by an additional \$10,000. The trial court did not abuse its discretion by permitting plaintiff to pay the arrearage over time.

Nor did the trial court err in ordering that surcharges generally applicable to past due support obligations not be imposed or permitted to accumulate against the arrearage. Defendant is correct that the Support and Parenting Time Enforcement Act (SPTEA), MCL 552.601 *et seq.*, mandates the imposition of a surcharge on support payments that are past due. See MCL 552.603a(1); see also *Adams v Linderman*, 244 Mich App 178, 184-185; 624 NW2d 776 (2000). However, contrary to defendant's assertion, a trial court is not without discretion to modify or otherwise discharge such surcharges. Pursuant to MCL 552.603a(3)(c), such charges may be "waived or abated by court order" obtained under the provisions of MCL 552.603d, which permits a party to seek "discharge of amounts assessed as surcharge and for the waiver of future surcharge."⁶ MCL 552.603d(1). Thus, it was within the court's discretion to order that "[s]urcharges shall not accumulate on this arrearage as long as [p]laintiff adheres to th[e] payment schedule."

⁵ Although plaintiff arguably asserted an inability to pay in his motion seeking to establish a plan for payment of the arrearage, defendant is correct that a party's unverified pleadings do not constitute evidence for any purpose. See, e.g., *Morris v Hoyt*, 11 Mich 9, 13 (1862).

⁶ Prior to the enactment of 2004 PA 208, which added both MCL 552.603a(3) and MCL 552.603d and was ordered to take immediate effect on July 14, 2004, this Court ruled that the plain language of MCL 552.603a(1) "mandates the imposition of [a] . . . surcharge on . . . support payments that are past due and deprives that circuit court of discretion to modify such surcharges." See *Adams, supra*. However, with the enactment of 2004 PA 208, the trial court now has the discretion to waive, discharge, or otherwise abate a surcharge imposed pursuant to MCL 552.603a(1).

Affirmed, but remanded for entry of an order requiring that the support credit paid by defendant in accordance with the judgment of divorce be refunded to her. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra