

STATE OF MICHIGAN
COURT OF APPEALS

ELIZABETH KORNACKI,

Plaintiff-Appellant,

v

THOMAS E. KULLGREN,

Defendant-Appellee.

UNPUBLISHED

January 12, 2010

No. 287326

Midland Circuit Court

LC No. 07-001877-DZ

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

In this separate maintenance action, plaintiff appeals by right the trial court's order denying her motion for attorney fees. We affirm.

On appeal, plaintiff argues that the trial court erred in refusing to award her attorney fees after incorrectly determining that she could afford to pay for her own attorney. Specifically, she contends that the trial court erred in including defendant's child support payments of \$131 per month and the child's Social Security income of \$1,095 per month as assets she could use to pay her attorney's fees. We disagree. We review for an abuse of discretion a trial court's decision regarding the grant or denial of attorney fees. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). Further, "[a]ny findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error" *Id.* (citation omitted).

At the outset, we note that plaintiff has presented no authority in support of her position that the trial court cannot consider child support or Social Security payments in determining a spouse's needs for attorney fee purposes. Plaintiff has not explained how her legal bills, which were three times those of defendant's, were necessary, nor has plaintiff discussed defendant's ability to pay. "[W]here a party fails to brief the merits of an allegation of error [and fails to cite any supporting legal authority], the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). However, assuming that this issue had not been abandoned, we would nonetheless find that the trial court did not abuse its discretion in deciding not to award plaintiff attorney fees.

"Generally, a party may not recover attorney fees, as either costs or damages, unless recovery is expressly authorized by statute, court rule, or a recognized exception." *Featherstone v Steinhoff*, 226 Mich App 584, 592-593; 575 NW2d 6 (1997) (citation and quotation marks omitted). MCR 3.206(C) allows an award of attorney fees where the party requesting the fees

alleges facts sufficient to show that the party is unable to bear the expense of the action and the other party is able to pay. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999); MCR 3.206(C). In a domestic relations action, the court may award reasonable attorney fees where necessary to enable a party to prosecute or defend the suit. *Heike v Heike*, 198 Mich App 289, 294; 497 NW2d 220 (1993). In such instances, “[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 appropriately applied these principles here. Plaintiff’s calculations reveal that she receives \$45,420 in net yearly spousal support. When her self-reported household expenses are subtracted from this number and the other household income she receives, it leaves an after-tax surplus of \$1,144 per month. Thus, plaintiff should be able to satisfy her legal obligations without using the principal of her marital property award.

Further, the fact that the trial court included defendant’s child support payment in determining whether plaintiff could afford to prosecute her divorce suit was not abuse of discretion. It is well settled that child support payments are intended for the benefit of the child. *Gallagher v Dep’t of Social Services*, 24 Mich App 558, 565; 180 NW2d 477 (1970). However, it does not appear that the trial court inappropriately considered the child support as part of plaintiff’s income stream, but instead considered it when determining the extent of plaintiff’s needs. This approach was reasonable given that plaintiff’s expense sheet includes items, such as various housing expenses and \$1,200 per month for “groceries, sundries, toiletries, etc.” that clearly benefit the child as well as plaintiff.

Lastly, to the extent plaintiff contends that Social Security payments should have been treated differently from the other child support payments here, we disagree. Pursuant to the divorce judgment, the Social Security payments were to be made in lieu of additional child support. Social Security payments can be credited against child support obligations. See *Fisher v Fisher*, 276 Mich App 424, 427-428; 741 NW2d 68 (2007). Thus, we find that the trial court did not abuse its discretion when it decided to treat the payments as it treated defendant’s additional child support payment, and to use this money to determine whether plaintiff could meet her needs and still pay her attorney fees without invading her property settlement. Rather than attempt to subtract out this additional income and then trying to sort out the expenses that would be chargeable to the parties’ child in further proceedings, the trial court essentially estimated that the result would be the same. The trial court’s decision fell within the range of reasonable outcomes.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck