

STATE OF MICHIGAN
COURT OF APPEALS

ELIZABETH CHRISTINA BERRY,

Plaintiff-Appellee/Cross-Appellant,

v

DENNIS LEE BERRY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED

August 7, 2012

No. 298991

Oakland Circuit Court

LC No. 2008-749737-DM

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Defendant, Dennis Berry, appeals the trial court's judgment of divorce, and plaintiff, Elizabeth Berry, cross-appeals. For the reasons set forth below, we affirm in part and reverse in part.

I. FACTS AND PROCEEDINGS

Plaintiff and defendant married on December 19, 1987. They had three children during the marriage, two of whom were minors at the time of trial. The record reflects that plaintiff stopped working outside the home in 1992 to care for the children. Defendant was 54 at the time of trial and was employed as president and chief operating officer of Eberspaecher North America. In that position, defendant earned a base salary of \$235,000, plus bonuses. In 2008, the year before the divorce trial, defendant's gross income was \$368,000. Defendant also earned income for serving on the board of directors of U.S. Farathane Corporation.

Plaintiff filed a complaint for divorce on August 6, 2008. The parties resolved issues regarding custody and parenting time and the trial court held a bench trial on the remaining issues on September 29, 2009 and December 4, 2009. The parties agreed that the marital home should be sold as well as their Canadian cottage, both of which were on the market during trial. The parties disagreed about the cause of their marital breakdown. It is undisputed that defendant spent significant time away from home for work, which often included national and international travel. According to plaintiff, during their marriage, defendant began a relationship with a woman with whom he worked, Alexandra Schlosser. Plaintiff confronted defendant about what she regarded as his affair and defendant repeatedly denied any intimate involvement with Ms. Schlosser. After a physical confrontation, plaintiff asked defendant to leave the marital home on April 20, 2008. According to defendant, the marriage began to deteriorate because plaintiff

became significantly more religious a few years before the divorce proceedings. He testified that plaintiff's beliefs and behavior changed to the point that they no longer enjoyed the same leisure activities. Defendant admitted that he had an affair earlier in their marriage, but testified that he did not begin a sexual relationship with Ms. Schlosser until after plaintiff filed her complaint for divorce. Thereafter, defendant dated Ms. Schlosser throughout the proceedings.

On March 11, 2010, the trial court entered an opinion and order in which it granted the divorce and ruled on the division of marital property and support obligations. The court also ordered defendant to pay \$15,000 of plaintiff's attorney fees. On April 19, 2010, the trial court entered the judgment of divorce that reiterated the court's prior rulings. Defendant filed motions for reconsideration and argued that the property distribution inequitably favored plaintiff and that his support obligations were excessive. He also submitted evidence to show that he lost his position on the board of directors at U.S. Farathane Corporation, and therefore asked the court to recalculate the amounts of child support and spousal support to exclude income from that position. On June 17, 2010, the trial court entered an order that reaffirmed its property distribution and modified the amount defendant must pay for child support. The court also clarified that defendant must pay plaintiff \$1,500 per month in spousal support and continue to pay status quo household expenses until the marital home is sold, and thereafter, defendant would no longer pay any household expenses, but would be required to pay plaintiff \$6,900 per month in spousal support for a period of ten years.

II. ANALYSIS

A. SPOUSAL SUPPORT

Defendant contends that the trial court erred by awarding plaintiff spousal support and plaintiff argues that the award of spousal support should have been permanent. Pursuant to MCL 552.23(1), "[u]pon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case."

Thus, it is within the discretion of the trial court to award spousal support to a party in a divorce action. *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). As the *Woodington* Court further explained at 355-356:

An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The trial court's findings of fact relating to an award of spousal support are reviewed for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000).

"In deciding a divorce action, the circuit court must make findings of fact and dispositional rulings." *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d

357 (1996) (citations omitted). This Court must first review the trial court's findings of fact. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). Findings of fact, such as a trial court's valuation of particular marital assets, will not be reversed unless clearly erroneous. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). A finding 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 was made. *Id.*; *Johnson v Johnson*, 276 Mich App 1, 10–11; 739 NW2d 877 (2007). Special deference is given to the trial court's findings when they are based on the credibility of the witnesses. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). The determination of the proper time for valuation of an asset is in the trial court's discretion. *Gates v Gates*, 256 Mich App 420, 427; 664 NW2d 231 (2003). If the trial court's findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts. *Sparks*, 440 Mich at 151–152. “The court's dispositional ruling should be affirmed unless this Court is left with the firm conviction that the division was inequitable.” *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005).

“The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case.” *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336 (2008). Our courts have repeatedly held that, in awarding spousal support, a trial court should consider the factors set forth in *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003):

(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 alimony, (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.

Defendant maintains that, in awarding plaintiff spousal support of \$6,900 per month for ten years, the trial court “erred by failing to impute income to plaintiff.” As noted, in deciding an award of spousal support, the trial court should consider, among other things, “the abilities of the parties to work” *Olson*, 256 Mich App at 631. Defendant asserts that plaintiff is able to work, but she has not made sufficient efforts to find work in light of her good health and her prior employment history. Defendant also cites, *Moore*, 242 Mich App at 655, in which this Court ruled that, “[i]f a court finds that a party has voluntarily reduced the party's income, the court may impute additional income in order to arrive at an appropriate alimony award.” *Id.* According to defendant, plaintiff chose to quit working in 1992, and the court should have considered this in deciding some amount of imputed income.

We hold that the trial court did not clearly err in its findings of fact with regard to plaintiff's ability to work and in finding no basis to impute income to plaintiff. Two witnesses

testified at trial, plaintiff and defendant, and, again, “[s]pecial deference is given to the trial court’s findings when they are based on the credibility of the witnesses.” *Draggoo*, 223 Mich App at 429. Plaintiff testified that she stopped working after she had her second child because defendant asked her to do so. According to plaintiff, defendant believed it was his job to earn money and plaintiff’s job to take care of the children. Defendant testified that, when plaintiff’s parents could no longer watch the children in 1992, he and plaintiff decided that plaintiff should stay home to raise the children. This is not a situation in which a party has voluntarily reduced her income such that otherwise nonexistent income should be imputed to her.

Plaintiff was 51 at the time of trial. Eighteen years before, plaintiff sold phone systems to businesses and she earned approximately \$35,000 per year. Plaintiff testified that her lack of a college degree and lack of computer skills now prevent her from applying for certain jobs that would provide her support. At the time of trial, she was taking a computer training course to update her skills. Plaintiff also testified that she did not make an effort to find work immediately after defendant left because she felt suicidal, the children were devastated, and she was simply trying to manage day-to-day. Defendant presented evidence that plaintiff made numerous charges on her credit card after he left and argued that, if plaintiff could shop, she could have also looked for work. The trial court considered plaintiff’s prior work experience and her years as a stay-at-home mother, and observed that, at this time, “[p]laintiff lacks the skills and experience necessary to obtain employment from which she can fully support herself and the children.” The court further noted that, when the houses are sold, plaintiff will need to find suitable housing and she will require health insurance. The court also emphasized that defendant has a substantial income and is financially able to provide support to plaintiff. Though defendant testified that the average tenure for a CEO at a company like Eberspaecher is approximately five years, no evidence suggests that his position was actually in jeopardy and it is clear that his career path has led him to more and more lucrative positions. The trial court did not clearly err in its findings of fact on these issues.

Defendant argues that the trial court did not adequately take into account the substantial property award it made to plaintiff in deciding its award of spousal support. While the trial court awarded plaintiff half of the parties’ property, the houses were not yet sold at the time of trial and the amount she would receive from those potential sales cannot be precisely determined. Further, the retirement accounts would not provide plaintiff a source of current income. Also, the parties did not present evidence during trial about exact amounts in the parties’ checking and savings accounts to determine whether they would be sufficient to provide plaintiff long or short-term income.

Defendant complains that the trial court failed to take into account plaintiff’s habit of overspending after she filed for divorce. The trial court specifically considered plaintiff’s spending when it weighed the relative conduct of the parties and general principles of equity, two of the *Olson* factors described above. Indeed, the court found plaintiff’s spending “disturbing” and admonished plaintiff for her extravagant and unnecessary purchases. However, the court also found defendant culpable for his conduct of dating Ms. Schlosser while both were married, especially when there were minor children remaining at home. Plaintiff contends that, because of defendant’s relationship with Ms. Schlosser, the trial court should have found defendant more at fault for the breakdown of the marriage. Evidence showed that, while plaintiff may have had a reasonable suspicion that defendant was involved with Ms. Schlosser for some time before

plaintiff's separation from defendant, the marital relationship was also strained because of defendant's work schedule and plaintiff's behavioral changes. Plaintiff also physically assaulted defendant before asking him to leave the home. The trial court also properly took into account plaintiff's pattern of intentional overspending after she filed for divorce. The trial court did not clearly err in finding that both parties were at fault for the breakdown of the marriage and in considering both parties' conduct when awarding spousal support.

We further hold that the trial court's award of spousal support was fair and equitable in light of its findings of fact and the award did not constitute an abuse of discretion. For the reasons set forth above, the trial court reasonably concluded that it will take some time for plaintiff to secure employment to support herself and to pay for a new home, household expenses, and health insurance. However, with time and further education, plaintiff is able to work, and the trial court's decision to limit her spousal support to a period of ten years is fully consistent with principles of equity.

Defendant complains that he contributed more to the household finances over the years, but it is undisputed that, in 1992, both parties agreed that plaintiff should stay home with the children. The record further establishes that plaintiff helped defendant excel in his career by raising the children, keeping both homes, and regularly entertaining defendant's work associates. Further, the amount of support the trial court awarded serves to balance the incomes and needs of the parties, *Moore*, 242 Mich App at 654, and will provide plaintiff the means and opportunity to reenter the workforce. Defendant's assertion that the award of spousal support will leave him impoverished is simply without merit. The court did not require defendant to pay plaintiff the full amount of spousal support until the parties sell the marital home. Further, defendant earns a monthly salary that is sufficient to meet his obligations without undue financial burden. While he testified that bonuses were eliminated because of the downturn in the auto industry, the trial court took this factor into account when deciding the amount of spousal support. And, though defendant characterizes his position at Eberspacher as "precarious," again, no evidence suggests that defendant is in imminent danger of losing his job and the amount of support is modifiable should plaintiff or defendant's financial circumstances change.

For these reasons, we reject the arguments raised by both defendant and plaintiff and affirm the trial court's award of spousal support.

B. DIVISION OF PROPERTY

Defendant argues that the trial court erred in its distribution of the marital assets. Specifically, he maintains that the trial court failed to consider money plaintiff took out of one of the marital accounts, insurance proceeds plaintiff received after her vehicle was destroyed in an accident, her overspending during the divorce proceedings, the value of a piano awarded to plaintiff, and defendant's contributions to paying down the parties' debts.

In *Sparks v Sparks*, 440 Mich 141, 159–160; 485 NW2d 893 (1992), our Supreme Court set forth the following factors a trial court should consider when dividing marital property: "(1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and

(9) general principles of equity.” The record reflects that the trial court considered the above factors in its opinion and judgment.

Plaintiff testified that, in early 2008, she discovered a bank statement showing \$70,000 in an account solely in the name of defendant. She demanded that defendant place her name on the account and she took approximately half of that money, as well as half of their \$14,000 tax return. According to plaintiff, defendant had not disclosed the existence of the account and she believed he might be hiding money from her. By that time, she was suspicious of defendant’s relationship with Ms. Schlosser. Plaintiff testified that she placed the money in a separate account because she feared that defendant might leave her and the children without any assets. This occurred before defendant left the marital home. Plaintiff spent some of the money on a new vehicle, she paid some to her divorce attorney, and spent some of the money on a vacation for her son’s sixteenth birthday. The trial court acknowledged plaintiff’s conduct, but also noted that defendant sold stock during the litigation without prior consent of the court. Defendant points out that he used the stock money and the money remaining in the bank account to pay down marital debts, including a substantial overdraft account that had reached its limit.

Defendant is correct that he used certain money to pay down debts the parties incurred before the divorce and the record is not clear about who was more responsible for those debts. The parties had reached the limit on their credit line, which defendant testified they generally used until he received his work bonuses. The record also reflects that the parties had a pattern of overspending on themselves and the children, which plaintiff saw fit to continue during the divorce. The parties had a federal tax debt as well because of a failure to properly report defendant’s earnings from U.S. Farathane. Defendant is also correct that, during the proceedings, he paid the household credit card that plaintiff overused. Further, while it may have been logical to plaintiff to take some money to protect herself in anticipation that defendant might leave, the manner in which she spent some of that money was inappropriate. However, defendant’s relationship with another married woman also amounted to inappropriate conduct and it is also not clear why defendant chose to place his \$70,000 bonus in his own, separate account before plaintiff discovered it. Defendant testified that plaintiff received a substantial amount of insurance money for her vehicle, but the record also shows that she bought the vehicle at a considerable discount from a relative and the fact remains that, if the vehicle was indeed totaled, plaintiff will need to buy a new form of transportation or make substantial repairs. Defendant complains that he was left with a truck of little comparable value, but he receives an \$1,100 per month car allowance from Eberspaecher and primarily drives a luxury vehicle provided by his company. With regard to plaintiff’s receipt of the grand piano, defendant received the more valuable asset, the boat, valued at approximately \$25,000.

The trial court granted each party roughly half of the marital property and the fact remains that defendant has substantial employment income while plaintiff has none, and no immediate ability to earn a comparable income. Further, though plaintiff will receive spousal support for a limited number of years, beyond that point she must support herself and the division of property will, in part, offset her diminished earning capacity after being out of the workforce for 18 years. Further, though the trial court could have considered defendant’s relationship outside the marriage to be more egregious, it is clear that the court took plaintiff’s use of marital funds seriously enough to decline her request for more of the marital estate. It is also clear that the trial court carefully considered factors such as the conduct of the parties, the

duration of the marriage, the debts and expenses existing prior to the break-up of the marriage, the parties' differing abilities to earn, and general principles of equity. While the trial court's property division may not have been mathematically equal in light of plaintiff's spending, and while the record does reflect that defendant paid toward outstanding debts, we cannot agree that that the property division was inequitable in light of the above factors. Accordingly, we find no abuse of discretion.

C. ATTORNEY FEES

Both parties take issue with the trial court's award of \$15,000 in attorney fees to plaintiff. According to defendant, the court should not have awarded plaintiff any attorney fees because she received an award of spousal support and a substantial portion of the marital assets. He also claims the trial court did not consider his actual ability to pay the attorney fees. Plaintiff argues that the trial court should have ordered defendant to pay \$42,780.36 in attorney fees owing at the time of trial as well as any additional attorney fees incurred during and after trial.

As this Court explained in *Ewald v Ewald*, 292 Mich App 706, 724-725; 810 NW2d 396 (2011).

Attorney fees are not recoverable as of right in a divorce action but may be awarded to enable a party to carry on or defend the action. MCL 552.13; MCR 3.206(C)(1). A party seeking attorney fees must establish both financial need and the ability of the other party to pay. MCR 3.206(C)(2)(a); *Woodington*[, 288 Mich App at 370]. This Court reviews a trial court's decision to grant or deny attorney fees for an abuse of discretion; the court's findings of fact on which it bases its decision are reviewed for clear error. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). The trial court abuses its discretion when its decision results in an outcome that falls outside the range of reasonable and principled outcomes. *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008). "The party requesting the attorney fees has the burden of showing facts sufficient to justify the award." *Woodington*, 288 Mich App at 370. This would include proving both financial need and the ability of the other party to pay, *Smith*, 278 Mich App at 207, as well as the amount of the claimed fees and their reasonableness, *Reed*, 265 Mich App at 165-166.

We hold that the trial court did not abuse its discretion in awarding plaintiff \$15,000 in attorney fees. The trial court ordered the parties to split the proceeds of the sale of both the cottage and marital home, both of which remained on the market at the time of trial. It is undisputed that the cottage is unencumbered and has an approximate value of \$400,000, less certain unspecified real estate fees or taxes applicable in Canada. The parties carried a substantial mortgage on the marital home. Thus, while plaintiff is anticipated to receive money from those sales, her means of income would remain limited to spousal support and it is unclear how much plaintiff may realize from those properties. Defendant will also receive half of the money from the sale of the properties and, again, has a substantial annual income. "It is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Gates*, 256 Mich App at 438. Because plaintiff will receive some distribution from the sale of the properties, it did not constitute an abuse of the

discretion for the trial court to decline to award her all of her attorney fees. However, in light of the as-yet undetermined amount of the real estate sales, it was reasonable for the court to award her part of those costs so that she will not be required to use her only means of support to pay those fees.

D. MOTION FOR RECONSIDERATION

We agree with plaintiff that the trial court should not have modified its award of child support pursuant to defendant's motion for reconsideration. This Court reviews a trial court's decision regarding a motion for reconsideration for an abuse of discretion. *Ensink v Mecosta County General Hosp*, 262 Mich App 518, 540; 687 NW2d 143 (2004). The record reflects that defendant filed motions for reconsideration pursuant to MCR 2.119, one of which requested a reduction of his support obligations because he lost his position as a board member of U.S. Farathane. Defendant filed his motion before the trial court entered the judgment of divorce. With his motion, defendant submitted a letter stating that he was not re-elected to the board. The trial court granted defendant's motion in part and reduced his child support obligation after it entered the judgment of divorce.

We hold that defendant's motion should have been filed and considered as a motion to modify his support obligations based on a change of circumstances or a motion for relief from judgment. Plaintiff's point is well taken that, because the court considered defendant's motion under MCR 2.119, plaintiff was not permitted to challenge or respond to defendant's new evidence and could not otherwise argue that the income defendant apparently lost from U.S. Farathane should be imputed to him notwithstanding his apparent termination. Further, MCR 2.119(F)(3) requires a showing of "a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." Defendant's assertion that he lost his job on the board after the divorce trial is new evidence, not palpable error. Thus, defendant was not entitled to relief pursuant to MCR 2.119. Moreover, while defendant asserts that the trial court could revise its decision before entry of a final judgment pursuant to MCR 2.604(A), he did not bring his motion under this rule and, again, the divorce judgment was entered before it decided the motion and its order was, therefore, not simply a "revision before entry of final judgment." Accordingly, we reverse the trial court's order that granted in part defendant's motion for reconsideration.

Affirmed in part and reversed in part.

/s/ Elizabeth L. Gleicher
/s/ Henry William Saad
/s/ Jane M. Beckering