

STATE OF MICHIGAN
COURT OF APPEALS

SHARON P. GRIFFIN,

Plaintiff-Appellee,

v

CURT D. GRIFFIN,

Defendant-Appellant.

UNPUBLISHED
October 20, 2015

Nos. 321988; 324840
Livingston Circuit Court
Family Division
LC No. 07-040094-DM

Before: M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

In this consolidated appeal, defendant appeals by right in Docket No. 321988 from an order of the trial court granting plaintiff sole legal custody of the parties' minor child, setting forth a parenting-time schedule, establishing child support, and ordering defendant to pay 75% of plaintiff's outstanding attorney fees. The challenge in that appeal is limited to the award of attorney fees. The court subsequently entered an order requiring defendant to pay 75% of plaintiff's appellate attorney fees, and defendant's challenge to that award is the subject of defendant's appeal by right in Docket No. 324840. We affirm.

I. BACKGROUND

The parties divorced in 2008. The issues resulting in this appeal arose after plaintiff and defendant each filed competing motions in October 2009 concerning the custody and parenting time for their daughter. These motions resulted in a lengthy series of hearings before the Friend of the Court (FOC) referee and numerous hearings before the trial court. Ultimately, the FOC recommendation to grant plaintiff sole legal custody of the child was adopted by the trial court over defendant's objection. Defendant then appealed. On appeal, we remanded to the trial court because the parties had not had a hearing on the best-interest factors. *Griffin v Griffin*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2012 (Docket No. 305889), pp 2-3.

On remand, the FOC referee concluded that granting plaintiff sole legal custody was in the child's best interests, and this decision was again affirmed by the trial court (now before a

different judge) over defendant's objections. The trial court also awarded plaintiff attorney fees. In doing so the court concluded that plaintiff's attorney fees were \$42,736.66, and that she had \$63,000 in yearly income and \$20,000 in liquid assets.¹ In contrast, the trial court found that defendant had an average income of \$210,000 and approximately \$6 million in liquid assets. Relying on *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995), *Stallworth v Stallworth*, 275 Mich App 282; 738 NW2d 264 (2007), and *Wright v Wright*, 279 Mich App 291; 761 NW2d 443 (2008), the trial court ordered defendant to pay 75% of plaintiff's attorney fees.

Following defendant's appeal of the trial court's attorney fee award, plaintiff moved the trial court for an award of appellate attorney fees. The trial court held an evidentiary hearing to determine whether there had been a change of circumstances since the time of its previous award of attorney fees. At the hearing, plaintiff claimed that her appellate attorney fees were a flat rate of \$6,000. Plaintiff's pay stubs and tax return were admitted and showed her annual salary to be \$59,000. Plaintiff testified that she lives in a condominium that was completely paid for by her divorce settlement. Additionally, it was revealed that plaintiff had at least \$171,000 in various savings and retirement accounts. Defendant testified that he made \$140,000 in 2013 and that he had no major increases or decreases in spending from the previous year. Defendant stated that his monthly budget was approximately \$19,000, \$15,000 of which he paid for by pulling funds from his savings, which were still estimated to be around \$6 million. Defendant testified that his home is worth approximately \$800,000. At the conclusion of the hearing, the trial court held that while plaintiff did have some ability to pay, an award of appellate attorney fees was proper. The trial court awarded appellate attorney fees to plaintiff in the same percentages as in its previous attorney fee award. Defendant now challenges both orders.

II. ANALYSIS

The trial court's decisions to award plaintiff attorney fees in Docket No. 321988 and appellate attorney fees in Docket No. 324840 are reviewed for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 437-438; 664 NW2d 231 (2003). An abuse of discretion occurs when a trial court's decision is outside the range of reasonable and principled outcomes. *Stallworth*, 275 Mich App at 289. "[F]indings of fact on which the trial court bases an award of attorney fees are reviewed for clear error . . ." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 381-382; 652 NW2d 474 (2002). Questions of law are reviewed de novo. *Reed*, 265 Mich App at 164.

Perhaps in recognition of the trial court's explicit citation in its opinion to controlling case law—*Hanaway*, *Stallworth*, and *Wright*—defendant takes the unique position of primarily arguing that we should reverse the trial court for having relied on that controlling case law. Defendant argues this because, in his view, these three decisions have established judicial tests for determining the appropriateness of awarding attorney fees under MCR 3.206 and MCL

¹ Defendant conceded that plaintiff's attorney fees were reasonable.

552.13(1) that are not faithful to the language of that rule and statute. We disagree with that assessment of our cases.

With respect to divorce actions, MCL 552.13(1) provides that a trial court “may require either party . . . to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency.” Similarly, MCR 3.206(c) provides as follows:

(1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, and that the other party is able to pay, or

(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

MCL 552.13(1) and MCR 3.206(c) are exceptions to the general rule that “attorney fees are not recoverable as an element of costs or damages.” *Grace v Grace*, 253 Mich App 357, 370-371; 655 NW2d 595 (2002). Both the statute and the court rule require that, in a divorce action, attorney fees “may be awarded only when a party needs financial assistance to prosecute or defend the suit.” *Reed*, 265 Mich App at 164. The party requesting the fees must “allege facts sufficient to show that the party is unable to bear the expense of the action.” *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999).

In *Hanaway*, 208 Mich App at 298, the Court explained 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.” Consistent with this general rule, the *Stallworth* Court determined that the plaintiff “sufficiently demonstrated her inability to pay her attorney fees” when her yearly income was less than the amount she owed in attorney fees. *Stallworth*, 275 Mich App at 288. The Court concluded that because the defendant’s annual income was double that of the plaintiffs, he had the ability to contribute to the plaintiff’s fees. *Id.* at 288-289. In *Wright*, 279 Mich App at 305-306, where the defendant made \$30,000 a year and the plaintiff made \$64,901, the Court upheld the decision of a trial court that ordered the plaintiff to pay 30% of the defendant’s \$22,500 attorney fees, in part because the defendant’s attorney fees constituted 75% of her yearly income. *Id.*

Defendant devotes much of his argument on what he characterizes as the “bright-line” tests established by this Court, chiefly in *Stallworth*, as having deviated from the statutory and court rule requirements that the party requesting attorney fees must show an inability to bear the expense of the action. Defendant has misconstrued *Stallworth*. *Stallworth* presented one instance in which this Court determined that a party would be unable to prosecute or defend an action absent an award of attorney fees where her income was less than the amount of fees she owed. See *Mixon v Mixon*, 51 Mich App 696, 702; 216 NW2d 625 (1974) (“[A]ttorney fees are

not awarded as a matter of right but only if necessary to enable a party to carry on or defend the litigation.”). *Stallworth* (nor *Hanaway* or *Wright*, for that matter) did not create a bright line test. Instead, *Stallworth* and these other cases merely applied certain factors in deciding whether the court rule requirement that a party prove that he “is unable to bear the expense of the action, and the other party is unable to pay,” MCR 3.206(c)(2)(a), has been met. See *Loutts v Loutts (After Remand)*, 309 Mich App 203, 216-217; ___ NW2d ___ (2015).

It is clear from the record that the attorney fees owed by plaintiff for prosecuting this case in the trial court constitute a significant fraction of her annual income. And while it is true that the trial court awarded plaintiff a far greater percentage of her fees than the 54% awarded in *Stallworth*, 275 Mich App at 288, or the 30% in *Wright*, 279 Mich App at 306, it is also true that defendant’s assets and income greatly exceeded those of the parties required to pay in those cases. *Wright*, 279 Mich App at 305; *Stallworth*, 275 Mich App at 286, 288-289. Given this fact, the trial court’s findings under controlling law, and the deferential standard of review, we affirm the trial court’s decision to award plaintiff 75% of her attorney fees in Docket No. 321988.

We reach the same conclusion with respect to the trial court’s decision to award plaintiff 75% of her appellate attorney fees in Docket No. 321840. In making its determination to award plaintiff \$6,000 in appellate attorney fees, the trial court was persuaded by the fact that, after deducting her expenses from her income, plaintiff had an annual surplus of only \$1,560, while defendant’s expenses were \$19,000 per month and he had \$6 million in liquid assets. Based on these facts, defendant had the ability to pay and plaintiff did not have an ability “to bear the expense of the action.” *Kosch*, 233 Mich App at 354. The trial court did not abuse its discretion in concluding that plaintiff could bear 25% of the costs, and defendant 75%.

Affirmed. Plaintiff may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro