

STATE OF MICHIGAN
COURT OF APPEALS

KAREN L. SMITH,

Plaintiff-Appellee/Cross-Appellant,

v

KENNETH M. SMITH,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED

March 28, 2006

No. 257611

Crawford Circuit Court

LC No. 03-006031-DO

Before: Murphy, P.J., and White and Meter, JJ.

PER CURIAM.

Defendant Kenneth Smith appeals and plaintiff Karen Smith cross appeals a judgment of divorce that ended the parties' eight-year marriage. On appeal, both sides contest various aspects of the judgment. We affirm with respect to the issues presented by defendant and, in part, those raised by plaintiff; however, we also vacate in part and remand, directing the trial court to clarify its ruling with respect to the overdue 1999 taxes and to correct that portion of the judgment addressing the disposition of the marital home.

Defendant first argues that the trial court abused its discretion in awarding plaintiff a lump-sum of \$2,400 in spousal support without rendering the necessary factual findings relative to the various factors that are to be considered when setting spousal support. We disagree.

“Whether to award spousal support is in the trial court's discretion, and we review the trial court's award for an abuse of discretion.” *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). “The trial court's decision regarding spousal support must be affirmed unless we are firmly convinced that it was inequitable.” *Id.* at 433. The trial court's factual findings are reviewed for clear error, and these factual findings are presumptively correct, with the burden being on the appellant to show clear error. *Olson v Olson*, 256 Mich App 619, 629; 671 NW2d 64 (2003).

“The court should consider 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. The trial court should make specific findings of fact regarding those factors that are relevant to the particular case.” *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993)(citations omitted). This Court in *Lee v Lee*, 191 Mich App 73, 80; 477 NW2d 429 (1991), stated, “We do not believe that the court's failure to specifically state its findings regarding each consideration

requires reversal where our review of the record indicates that we would not have reached a different result.” Moreover, brief, definite, and pertinent findings and conclusions on contested matters in a bench trial are sufficient without the need for overelaboration of detail or particularization of facts. MCR 2.517(A)(2); *Fletcher v Fletcher*, 447 Mich 871, 883; 526 NW2d 889 (1994).

The court’s findings on the record were fairly cursory; however, they were sufficient. The court, in awarding spousal support, commented on and considered the length of the marriage, the parties’ needs, the parties’ ability to pay, plaintiff’s age, and her health. Other factors were touched upon by the court throughout its ruling from the bench. Moreover, defendant testified that he received roughly \$2,700 total monthly income from various disability income sources and retirement plans. Plaintiff testified that she was able to work only part time as a medical biller, earning less than \$200 per week after taxes, and that she would have no health insurance after the divorce. Reversal is unwarranted on this issue.

Defendant next argues that the trial court clearly erred by awarding plaintiff \$5,900 from a \$35,000 legal settlement that he received before the divorce. We disagree.

Defendant states—without citation to authority—that “adequate case law . . . suggests that an award for pain and suffering is of such a unique personal nature that it must only belong to the spouse receiving it.” However, at trial, defendant specifically argued that the award represented compensation for lost future wages, and in defendant’s appellate brief, he references the testimony which indicated that the payment on the injury claim was to cover future wages, not pain and suffering. The record on this issue is vague and confusing, as it is on several issues. Defendant testified that he received a \$35,000 settlement for a 1998 work injury. Defendant spent all but \$4,700 of it between April and early August 2003. The parties were married in 1995, the divorce complaint was filed on March 14, 2003, and the divorce judgment was entered on August 5, 2004. The injury and payment thereon occurred during the marriage and prior to judgment, and any compensation for lost future wages necessarily entailed some lost wages that would have been received during the marriage. We note that workers’ compensation proceeds are considered marital property subject to division. *Hagen v Hagen*, 202 Mich App 254, 258-260; 508 NW2d 196 (1993)(division of payments on workers’ compensation claim for injury that occurred during the marriage found proper); *Lee, supra* at 79 (workers’ compensation benefits properly included in marital estate); *Evans v Evans*, 98 Mich App 328, 330; 296 NW2d 248 (1980)(workers’ compensation proceeds received during course of the marriage considered marital property subject to division). Additionally, proceeds from a civil suit award or settlement representing lost wages are subject to division as joint marital property. See *Lee, supra* at 79. Although proceeds from an award or settlement specifically awarded to one spouse for pain and suffering are typically not subject to division, such proceeds may still be divided under MCL 552.23 and MCL 552.401. *Id.*

Here, plaintiff was awarded a small fraction of the settlement proceeds, which arose from an injury that occurred during the marriage, and which were paid to defendant and spent before judgment was entered. Further, defendant himself claims that the proceeds covered lost future wages; future wages defendant would have received, minimally in part, during the marriage. There was no error with respect to the court’s award.

Defendant next argues that the court abused its discretion by awarding plaintiff part of a joint tax refund that was received after a court ruling changed the tax treatment of his retirement pension and before the parties divorced. We disagree.

Defendant relies on *Lesko v Lesko*, 184 Mich App 395; 457 NW2d 695 (1990), and *Kurz v Kurz*, 178 Mich App 284; 443 NW2d 782 (1989).¹ However, those cases are both distinguishable because they involved the right to future pension payments, which were to be received after the divorce, rather than pension payments received during the course of the marriage. In this case, the money at issue was in hand rather than an award of future payments to one spouse from a pension earned by the other. The refunds were issued while the parties were married. Defendant cites no valid authority to support his implicit argument that money actually issued to both parties should be treated as a separate asset.

Defendant cites no authority for the proposition that these items should not be part of the marital estate. A statement of position without supporting citations is insufficient to bring an issue before this Court. A party may not leave it to this Court to search for authority to sustain or reject its position. Therefore, this issue is not before this Court. However, we note that, even if it were, the lower court's findings relative to this issue are not in clear error. MCR 2.613(C). [*Wiand v Wiand*, 178 Mich App 137, 150; 443 NW2d 464 (1989) (citation omitted).]

Nor does defendant argue that the parties maintained separate financial identities during their marriage, or that the money, had it not been paid in taxes during the marriage, would have been maintained separately from the parties' joint assets. Therefore, defendant has not shown that the court made an error in dividing the value of the tax refund.

Defendant's final argument is that the court did not sufficiently sanction plaintiff by finding her in contempt for violations of a mutual restraining order. However, the court specifically addressed both plaintiff's misconduct and defendant's arguments on the issue:

The Court: Let me address the issue, though, just so it's clear. So, if this—you know—if anyone wants to run this case up the appellate ladder, they're free to do so. But, at least, I'll put my reasoning here.

I was going to—at—at one juncture, during the trial, I was—thinking that, in all fairness, this ought to be fifty-five/forty-five split—because of Mr. Smith's conduct during the divorce. But I—I didn't do that, and I took into account the

¹ Both *Lesko* and *Kurz* have been rejected by this Court to the extent that they flatly prohibit inclusion of pension benefits accrued before the marriage in the division of marital property. *Booth v Booth*, 194 Mich App 284, 291; 486 NW2d 116 (1992). Defendant's argument here is predicated on his claim that the refund was issued by the IRS on his disability pension that he earned *before* the marriage to plaintiff; however, *Booth* runs contrary to defendant's argument, and *Booth*, not *Lesko* and *Kurz*, was decided after November 1, 1990, making it binding precedent. MCR 7.215(J)(1).

points you made. And I think, on balance, it should be fifty/fifty. And, so, I've already factored that in, see? I was gonna [sic] go fifty-five/forty-five, actually at one point. But, on balance—

Plaintiff's counsel: After the argument, or what?

The Court: Well, no. You were reasonable about it. You were right on the target. And I—I—I—I take that into account in that regard—[interruption omitted]—just so the appellate court knows.

The court found that plaintiff had violated its order and sanctioned her by reducing her share and increasing defendant's share of the property settlement. Reversal is unwarranted.

Plaintiff, on the other hand, argues that reducing her share of the property settlement was an excessive sanction, particularly when compared to her allegations of defendant's misconduct during the marriage and his contempt citation during the trial. We find no abuse of discretion in the court's handling of the mutual fault and misconduct of the parties.

Notwithstanding Michigan's no-fault divorce law, fault is still one of many valid considerations in matters of property division and a trial judge's consideration of fault in determining a property division will not be disturbed absent an abuse of discretion. A determination of property division necessitates an examination of the following factors: . . . necessities and circumstances One of the circumstances to be considered in the determination of property division is the fault or misconduct of a party. [*Davey v Davey*, 106 Mich App 579, 581-582; 308 NW2d 468 (1981) (citations omitted).]

Although plaintiff argues that the property division fails to punish defendant sufficiently, the court's comments quoted above indicate that it considered fault and concluded that an even property division was most equitable, given the fault present on both sides. Plaintiff has not shown that this decision was an abuse of discretion.

Plaintiff next argues that the court abused its discretion in its handling of the outstanding liabilities for the parties' joint 1999 state and federal tax returns. Plaintiff argues that the court erred in only giving her a \$175 credit with regard to the parties' tax liability. This ruling is reflected in the transcript of the bench trial, but it does not appear to comport with the court's intent as reflected by earlier remarks, nor does it appear consistent with defendant's acquiescence that he should be equally responsible for the tax debt. We note that the divorce judgment itself does not expressly address the 1999 tax liability. Close scrutiny of the record reveals utter confusion on everyone's part regarding this issue. We remand so that the trial court may clarify this issue and render a clear ruling, which is then to be properly incorporated into the judgment. Although we are hesitant to remand because this issue should have been dealt with below in settling and entering the judgment or through post-judgment motions, we will allow the court to

revisit the issue under MCR 7.216(A), MCR 7.208(A)(1), and MCR 2.612(A)(1) so that it divides the parties' joint 1999 state and federal tax liability as intended.²

Near the close of trial, without citing record evidence, defendant's counsel argued that the parties' outstanding state and federal joint tax liability for 1999 was \$1,277. Plaintiff had earlier testified that the IRS had seized an \$886.88 tax refund from her as payment towards the parties' joint outstanding liability, and she sought reimbursement for half of that amount from defendant. The court referred to plaintiff's testimony when it noted "she already got nicked for eight hundred on her '03 return." Defendant appeared to concede his liability for half by noting that plaintiff had overpaid, and the court appears to have intended that the parties divide the total tax liability equally:

Q. Defense counsel: So, my point, Judge, is half of that liability would be six thirty-eight—

A. The Court: So, she's [interruption omitted] overpaid.

Q. —so —sure. But not—but not by the—she's asking for four hundred. She's only overpaid by a hundred and forty dollars, or a hundred and sixty-two. Pardon me.

A. As long as it's paid.

Q. Right.

A. Has it been paid?

Q. It's—

A. 'Cause otherwise, her next return could get zinged.

However, when the court returned to the issue later, both counsel and the court became quite confused, and instead of awarding plaintiff a credit for the amount she overpaid, the court ordered that plaintiff pay off the remaining tax liability and receive only a \$175 credit.

Because this case is on appeal, the trial court may not amend the judgment except by order of this Court.

The purpose behind MCR 2.612(A)(1) is "to make the lower court record and judgment accurately reflect what was done and decided at the trial level." *McDonald's Corp v Canton Twp*, 177 Mich App 153, 159; 441 NW2d 37 (1989)

² We do note that plaintiff, proceeding pro se, did file a motion in which she argued that defendant was in contempt of court and that she had not seen the divorce judgment prior to entry, which included language with which she disagreed. The record does not reveal that a ruling was issued with regard to this motion, nor that any hearing was held on the matter.

(citation omitted). Here the written judgment does not comport with the trial court's intended and orally expressed ruling We thus remand this case to the trial court to correct the judgment to accurately reflect what was decided by the trial court. [*Central Cartage Co v Fewless*, 232 Mich App 517, 536; 591 NW2d 422 (1998).]

We remand so that the trial court may enter a ruling dividing the outstanding tax liability in a manner that is consistent with the court's intent. We leave to the sound discretion of the court the matter on how to handle any additional interest and penalties that have accrued.

Finally, plaintiff also argues that the judgment fails to reflect the court's clear direction from the bench that defendant buy out plaintiff's interest in the marital home by paying \$11,250, representing half the equity in the marital home, within 90 days, or that the house be sold, with plaintiff receiving half the net equity on sale. This ruling is indeed reflected in the transcript of the bench trial, but it does not comport with the divorce judgment. Again, we are hesitant to remand because this issue should have been dealt with below in settling and entering the judgment or through post-judgment motions; however, we conclude that the judgment should be consistent with the court's ruling and allow the matter to be revisited. We vacate that portion of the judgment addressing the marital home and remand for correction of this aspect of the judgment. *Central Cartage, supra* at 536.

We affirm in part, and vacate in part and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Helene N. White

/s/ Patrick M. Meter