

STATE OF MICHIGAN
COURT OF APPEALS

SALLY LOU REID,

Plaintiff-Appellee,

v

SIMON JAMES REID II,

Defendant-Appellant.

UNPUBLISHED
December 5, 2006

No. 261710
Oakland Circuit Court
LC No. 2003-679966-DM

Before: Cavanagh, P.J., Bandstra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgment of divorce and amended judgment of divorce, challenging the spousal support, child support, property distribution, and debt allocation provisions, as well as the award of attorney fees in plaintiff's favor. We reverse and remand.

This divorce action was tried over several days, each essentially months apart, and included a change in plaintiff's counsel, as well as several interruptions in witness testimony. At the conclusion of these convoluted proceedings, the trial court rendered very few findings of fact and issued several unfair and inequitable dispositional rulings. Defendant's motion for reconsideration was denied and this appeal followed.

First, defendant argues that the trial court abused its discretion when it awarded plaintiff \$3,000 in attorney fees because she failed to establish that she was unable to bear the expense of the action. See *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). We agree.

In divorce actions, attorney fees are not recoverable as of right, but may only be awarded where necessary to preserve a party's ability to carry on or defend the action. *Id.*; see, also, MCL 552.13(1). Pursuant to MCR 3.206(C)(2), a party who requests attorney fees must allege facts sufficient to show that: (a) the party is unable to pay, but the other party is able to pay the expense; or (b) that such expense was incurred because of the other party's refusal to comply with a previous court order—a situation that has not been alleged in this case. However, "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 v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003).

In this case, the trial court made no findings of fact in support of its decision to award plaintiff attorney fees. After review of the record evidence, we conclude that plaintiff failed to establish that she was unable to pay her attorney or that she would be required to invade assets that she needed for support in order to satisfy her attorney fees. In fact, the record indicates that plaintiff was gainfully employed in possibly as many as three jobs, collected a retirement pension, had at least \$39,000 in a bank in Illinois, had an IRA account with an unknown amount, had another bank account in Illinois, and was awarded several valuable assets in the divorce. In consideration of these factors, as well as the trial court's other dispositional rulings in this case and plaintiff's failure to present any evidence in support of her request for attorney fees, we conclude that the trial court abused its discretion when it awarded plaintiff attorney fees in the amount of \$3,000. Therefore, this award is vacated. If defendant already satisfied this award, he is entitled to reimbursement.

Next, defendant argues that the trial court's finding of fact that plaintiff earned \$11,000 a year was clearly erroneous considering that no evidence supported that finding. See *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). We agree.

We have thoroughly reviewed the record in this case and conclude that plaintiff neither testified as to her income nor submitted evidence of any kind to establish her income. Apparently the trial court was relying on plaintiff's counsel's opening statement (\$15,000) or closing argument (\$11,000) for its determination that plaintiff earned \$11,000 a year. But, statements, arguments, and comments of counsel are not evidence. And, there is no evidence of record that counsel stipulated to plaintiff's income. Further, the evidence tends to refute that finding. Plaintiff worked as a bus driver, pizza maker and/or cocktail waitress, and canvas maker. She also collected a pension from Meijer. In addition, plaintiff had extensive experience in the areas of security and woodworking which may be considered for purposes of imputing income to her for child support and spousal support computations. See *Ghidotti v Barber*, 459 Mich 189, 198; 586 NW2d 883 (1998); *Moore v Moore*, 242 Mich App 652, 655; 619 NW2d 723 (2000). In sum, the trial court's conclusion that plaintiff earned \$11,000 a year was not supported by the record evidence and must be reversed. We remand this issue to the trial court for an evidentiary hearing as discussed below.

Next, defendant argues that the trial court inequitably assigned 60 percent of the marital debt, including credit card debt, to him. We agree.

"The goal of a court when apportioning a marital estate is to equitably divide it in light of all of the circumstances." *Reed v Reed*, 265 Mich App 131, 152; 693 NW2d 825 (2005). After a thorough review of the record, there is no indication as to how much marital debt was at issue. There is reference to a home equity loan, a loan from defendant's stock program, and credit card debt. However, no evidence establishing the amount of existing marital debt was admitted and, as discussed above, plaintiff's income was not properly determined. In these circumstances, the assignment of 60 percent of the unknown amount of marital debt to defendant was unfair and inequitable. Therefore, this ruling is vacated. We remand this issue to the trial court for an evidentiary hearing as discussed below.

Next, defendant argues that the amount of child support awarded to plaintiff by the trial court was excessive considering that one of their children resided with him. After reviewing the child support order for an abuse of discretion and the findings of fact associated with the support

order for clear error, we agree. See *Gehrke v Gehrke*, 266 Mich App 391, 395; 702 NW2d 617 (2005); *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999).

Parents have a duty to support their minor children. *Macomb Co Dep't of Social Services v Westerman*, 250 Mich App 372, 377; 645 NW2d 710 (2002). To assist in the determination of the “levels of support to be provided by each parent, the Legislature has required the application of the formula set forth in the Michigan Child Support Formula Manual.” *Paulson v Paulson*, 254 Mich App 568, 571; 657 NW2d 559 (2002); see, also, MCL 552.519, 552.605. The formula used in establishing a child support amount “shall be based upon the needs of the child and the actual resources of each parent” and “[t]he formula shall consider the child care and dependent health care coverage costs of each parent.” MCL 552.519(3)(a)(vi). As written, the formula “is based on factors including parental income, family size, and the children’s ages.” *Burba v Burba*, 461 Mich 637, 643; 610 NW2d 873 (2000).

In this case, the trial court made no findings of fact before ordering the disputed child support. See MCR 2.517. Therefore, it is unclear whether the court followed the mandates of the law with regard to its computation of child support. And, according to the 2004 Michigan Child Support Formula Manual, “[t]he first step in determining each parent’s support obligation is to ascertain each parent’s net income.” *Id.* at 7. In this case, plaintiff’s income was not ascertained. Because there is no indication in the lower court record as to how the child support award was determined and because plaintiff’s actual income was never ascertained, we vacate the award of child support and remand this issue for an evidentiary hearing as discussed below. The issue of whether income should be imputed to plaintiff should also be resolved at the evidentiary hearing.

Next, defendant argues that the trial court’s spousal award and property distribution, including defendant’s personal property and the household items, were inequitable under the circumstances. See *Olson v Olson*, 256 Mich App 619, 629-630; 671 NW2d 64 (2003). We agree.

The primary objective 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. Spousal support should be based on what is just and reasonable under the circumstances of the case. *Id.* In making such determination, the trial court should consider several factors, including:

- (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. [*Id.* (citations omitted).]

Other relevant factors may be considered. *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996).

Likewise, the goal in distributing marital assets is to reach an equitable distribution of property in light of all of the circumstances. *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). The division need not be mathematically equal, but any significant departure from congruence must be explained. *Gates, supra* at 423. Our Supreme Court in *Sparks, supra* at 159-160, held that certain factors, if relevant, must be considered with regard to property distributions and, further, that "the trial court shall make specific findings of fact regarding those factors." *Id.* at 159. The factors that are to be considered when they are relevant to a particular case are:

- (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 [*Id.* at 159-160.]

The *Sparks* Court also indicated that additional factors may be considered depending on the facts and circumstances of the particular case. *Id.* at 160.

In this case, the trial court made very few factual findings. The only factors considered were: (1) the length of the marriage; (2) a history of employment for each of the parties; and (3) that the parties were equally at fault for the breakdown of the marriage. But, there was evidence on the record, at least, regarding: (1) the past relations and conduct of the parties; (2) the abilities of the parties to work; (3) the parties' ages; (4) the present situation of the parties; (5) the parties' good health; (6) plaintiff's bank accounts in Illinois; (7) plaintiff's IRA; (8) the amount and allocation of marital debt; and (9) defendant's responsibility to provide COBRA benefits.

We conclude that, as in the case of *Sparks, supra* at 163, the trial court failed to make findings of fact essential to the proper resolution of these issues. See MCR 2.517(A). But, after review of the defendant's purported fiscal abilities, as well as the trial court's dispositional rulings, in total, it appears that defendant was effectively rendered financially destitute and unable to properly care for either himself or the child who resides with him. Therefore, the trial court's award of spousal support and property distribution is vacated and we remand these issues for an evidentiary hearing as discussed below.

Further, the trial court's dispositional ruling that "each party is awarded the personal and household items currently in their possession" was unfair and inequitable. Defendant was ordered by the court to leave the marital home almost a year before the judgment of divorce was entered and the record evidence revealed that plaintiff allowed him to take virtually nothing from

the house at that time. Defendant repeatedly testified that he had almost nothing from the house and almost none of his personal possessions. Plaintiff presented no evidence to refute defendant's claim. That the trial court ordered defendant to receive his tools, golf clubs, personal collections, train, antiques, his father's lighter, weights and a pool table does not render the property division equitable. The parties were married for twelve years, as the trial court indicated. In twelve years they would have acquired many, many items, both personal and household items. Plaintiff was adjudged entitled to them all, with the exception of a very few of defendant's personal items. This decision is also vacated and the issue is remanded for an evidentiary hearing as discussed below.

In sum, the provisions of the judgment of divorce and amended judgment of divorce pertaining to attorney fees, child support, spousal support, debt allocation, and property distribution are vacated. The provisions pertaining to child custody are not vacated. We conclude that plaintiff is not entitled to attorney fees. We further hold that an evidentiary hearing is to be conducted with regard to the issues of: (1) plaintiff's income, actual and imputed; (2) defendant's income; (3) marital debt allocation; (4) child support; (5) spousal support; and (6) property distribution, including defendant's personal property and the household items.

The trial court shall order that the parties provide complete documentary evidence on the issues of income, marital debt, and assets, both "personal" and marital. This evidence should include, at minimum: tax returns, W-2s, 1099s, billing statements, bank statements, pension information, investment account statements, and any other documentation that is relevant to the determination of each party's income, the value of the marital estate, the value of "personal" estates, the amount of marital debts, and the necessary living expenses of each party. Defendant is to be awarded an equitable share of the household items and, if that is not possible, he should be permitted to attempt to establish a valuation of the household items that he was denied. Defendant should also be awarded his personal possessions or, if that is not possible, he should be permitted to attempt to establish a valuation of the possessions that he was denied.

The evidentiary hearing shall be conducted within 28 days of the issuance of this opinion and the trial court shall render its complete findings of fact and dispositional rulings within 7 days of the evidentiary hearing. The trial court shall forward its written opinion and a copy of the evidentiary hearing transcript to this Court within 14 days of the entry of the trial court's opinion. The parties are permitted to file supplemental briefs to this Court; defendant within 21 days of the entry of the trial court's opinion, and plaintiff within 28 days of the entry of the trial court's opinion. This Court retains jurisdiction of this matter.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens