

STATE OF MICHIGAN  
COURT OF APPEALS

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THOMAS RISING,

Plaintiff-Appellee,

v

SANDRA RISING, by  
WALTER SAKOWSKI, as Guardian and  
Conservator for SANDRA RISING,

Defendant-Appellant.

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UNPUBLISHED  
August 2, 2011

Nos. 294258; 298502  
Wayne Circuit Court  
Family Division  
LC No. 07-722016-DM

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Sandra Rising challenges the trial court’s refusal to award spousal support and the division of marital assets in the judgment of divorce.<sup>1</sup> Rising further contests the denial of her post-judgment request for spousal support.<sup>2</sup> We affirm in part, reverse in part and remand for further proceedings.

I. SPOUSAL SUPPORT

Rising contends that the trial court erred when it failed to award her any spousal support. A trial court’s factual findings are reviewed for clear error.<sup>3</sup> A finding is deemed to be clearly erroneous if the reviewing court is “left with a definite and firm conviction that a mistake has been made.”<sup>4</sup> A trial court’s dispositional ruling must be affirmed unless this Court “is firmly convinced that it was inequitable.”<sup>5</sup>

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<sup>1</sup> Docket No. 294258.

<sup>2</sup> Docket No. 298502.

<sup>3</sup> *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003).

<sup>4</sup> *Id.* at 432-433.

<sup>5</sup> *Berger v Berger*, 277 Mich App 700, 727; 747 NW2d 336 (2008).

“The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. Alimony is to be based on what is just and reasonable under the circumstances of the case.”<sup>6</sup> When making this determination, a trial court should consider the following factors:

(1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the ability 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.<sup>7</sup>

Rising challenges seven of the trial court’s underlying factual findings pertaining to the aforementioned factors. We presume the trial court’s findings are correct and the burden is on Rising to demonstrate clear error.<sup>8</sup> Rising relies almost exclusively on evidence outside the record to meet her burden. The judgment of divorce was entered on September 2, 2009, more than two months before her post-judgment motion was filed. The prohibition against considering evidence outside the record even applies to matters “arising after the order from which [the] appeal has been taken.”<sup>9</sup> To the extent that any argument or reference to evidence introduced after the entry of judgment is improperly before this Court it will not be considered.

Initially, Rising challenges the trial court’s finding that she “squandered substantial sums of the parties’ monies gambling” in violation of an ex parte order. Contrary to her position on appeal, Rising admitted and the evidence verified that after the filing of the complaint for divorce Rising made numerous withdrawals from the parties’ joint accounts and her retirement accounts. Based on the evidence, this finding will not be disturbed.

Rising also disputes the trial court’s findings regarding her ability to work. Rising claims that the following underlying findings were erroneous: (1) she was not disabled; (2) she engaged in “doctor-shopping”; (3) she had a heroin addiction; (4) a doctor’s report lacked credibility; (5) her frequent trips to the casino were inconsistent with her contention of being disabled; and (6) she elected not to obtain employment. Effectively, Rising contests the trial court’s factual determination that she had an ability to work.

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<sup>6</sup> *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000) (internal citations omitted).

<sup>7</sup> *Berger*, 277 Mich App at 726-727.

<sup>8</sup> *Gates*, 256 Mich App at 432.

<sup>9</sup> *Coburn v Coburn*, 230 Mich App 118, 123; 583 NW2d 490 (1998), rev’d on other grounds 459 Mich 875 (1998); see also *Sherman v Sea-Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

The trial court did not believe that any physical or mental ailments prevented Rising from engaging in employment. The February 18, 2008, report of Dr. Kodali was the only evidence that suggested that Rising was unable to work. Kodali indicated that Rising suffered from “major depression” and was “unable to work at this time or in the near future,” but that she was “competent to handle her personal affairs and make decisions for herself” and that her prognosis was good “depending on the outcome of her divorce.” The trial court found these views to be contradictory and elected to give the opinion little weight. Specifically, the trial court noted that the opinion indicated Rising’s inability to work was limited to the “near future.” Since the trial court did not issue its opinion and judgment until almost a year later, it found that her condition should have sufficiently improved to permit employment. The trial court also relied on the testimony of the parties’ daughter who indicated that Rising routinely performed numerous physical household chores and did not appear incapacitated. Rising’s mother also testified that her daughter was mentally sound. The court noted that Rising admitted frequenting casinos several times a week for extended time periods and concluded that if Rising was competent to handle her own affairs, make personal decisions and routinely frequent casinos she should be capable of engaging in some form of employment.

After reviewing the evidence, we do not have a definite and firm conviction that the trial court’s determination regarding Rising’s ability to work was incorrect. The only applicable evidence to support Rising’s position were the notes from Dr. Kodali. A fact-finder is not obligated to accept an expert witness’s testimony and the amount of weight given to such evidence is within the sole province of the fact-finder.<sup>10</sup> Rising’s daughter and husband countered the doctor’s assertions by testifying that Rising performed a variety of physical tasks. The daughter also testified that Rising purchased a high-intensity workout DVD for her personal use. Rising was making weekly trips to the casino, with each visit lasting anywhere from 8 to 16 hours. As these factors stand in contravention of Rising’s assertion that she was unable to work, the trial court’s determination that she was capable of some type of employment was not clearly erroneous.

In a similar vein, Rising’s challenge to the trial court’s characterization of her visits to various medical professionals as “doctor-shopping” was not clearly erroneous. Since the court determined that Rising was capable of employment, it inferred that the multitude of medical visits were for the express purpose of “establishing a physical disability, in order not to work.” Whether Rising actually engaged in “doctor-shopping” is of little or no consequence and is irrelevant to the trial court’s determination that she had an ability to work.

Rising’s argument that the trial court erred when it referenced “heroin” in its opinion is moot. The trial court acknowledged that it misread the doctor’s report and rescinded all references to “heroin” in its opinion. Because the trial court stated that its removal of the reference did not affect its overall analysis, there is no additional remedy this Court can provide.

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<sup>10</sup> *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008).

A trial court's dispositional ruling on spousal support must be affirmed unless an appellate court is firmly convinced that it was inequitable.<sup>11</sup> This Court must perform an equity analysis even if the trial court's findings were not clearly erroneous.<sup>12</sup> When the trial court weighed the various factors, it determined that seven of them favored the husband, one favored Rising, and three were deemed to be neutral. Without disturbing any of the trial court's underlying factual findings, it is clear that the trial court incorrectly favored the husband on several of these factors.

Factor (3) relates to the parties' ability to work. Although the trial court found that both parties had the ability to work, it concluded that this factor favored the husband. In reaching this conclusion, the trial court improperly relied on and referred to findings such as its determination that Rising engaged in "doctor-shopping." These facts are unrelated and irrelevant with regard to the parties' *ability to work*. Because the factor addresses only to the parties' ability to work and both parties possessed this ability this factor should have been deemed neutral.

Factor (6) relates to the ability of the parties to pay alimony. The trial court found that this factor favored the husband even though he earned approximately \$70,000 a year while Rising was unemployed. While Rising's election not to work is relevant, it does not mandate that this factor should favor the husband. Even if Rising were employed, presumably earning minimum wage, it is clear that the husband's salary would place him in a superior position to be able to pay spousal support. Accordingly, this factor weighs in favor of Rising. Her decision not to seek employment can be addressed through income imputation.

For factor (7), which addresses "the present situation of the parties," the trial court again found this factor favored the husband. The trial court focused on Rising having squandered the parties' assets through gambling and her desire to avoid obtaining employment. These findings are simply a reiteration of the parties' past conduct. The *present* situation encompasses the husband earning \$70,000 a year and Rising living with her mother and, at most, having the capacity to earn only a minimum wage based on her previous work history. This factor should favor Rising. Similarly, the trial court concluded that factor (8) pertaining to "the needs of the parties" favored the husband. The evidence did not establish that the husband had greater needs than Rising resulting in this factor being neutral.

Factor (10) addresses "the prior standard of living of the parties." The parties lived in a house worth approximately \$85,000 and had a family income of \$70,000 a year as a direct result of the husband's earnings. Since 2001, Rising was a stay-at-home mother and the husband's role was as the sole financial provider for the household. Rising's earlier history of employment only demonstrated an ability to earn minimum wage. Rising's standard of living during the marriage far exceeded what she could be expected to accomplish on her own post-divorce. Inexplicably, the trial court found this factor to favor the husband but the factor clearly lends itself to Rising's receipt of spousal support.

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<sup>11</sup> *Berger*, 277 Mich App at 727.

<sup>12</sup> *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

Based on our re-examination of the trial court's evaluation of the factors, it becomes evident that only two factors favored the husband, while four factors favored Rising and five were neutral. A careful review of the opinion reveals that the trial court's denial of spousal support was heavily premised on Rising's invasion and squandering of marital assets after the litigation was initiated. While this is important and weighs heavily against Rising, a court cannot give disproportionate effect or weight to a single factor.<sup>13</sup> "The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. Alimony is to be based on what is just and reasonable under the circumstances of the case."<sup>14</sup> Post-divorce, the husband will continue to earn a comfortable living while Rising will be fortunate to obtain minimum wage employment. In this circumstance, the denial of spousal support is contrary to the goal of not impoverishing either party and is inequitable.

Rising's additional contention that the trial court erred when it denied her post-judgment motion seeking an award of spousal support based on new evidence is rendered moot. We note that Rising is now receiving Social Security Income (SSI) payments and is in an improved financial situation. This change in her financial status and the propriety of imputing income does not preclude an award of spousal support but merely comprise factors for consideration in determining the amount and duration.

## II. PROPERTY DIVISION

Rising also contends that the trial court's division of the marital property was inequitable. A judgment of divorce must include a determination of the property rights of the parties.<sup>15</sup> "The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances."<sup>16</sup> While the division need not be mathematically equal, "any significant departure from congruence must be clearly explained."<sup>17</sup> To obtain an equitable division, factors for a trial court to consider include:

- (1) duration of the marriage,
- (2) contributions of each party 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.<sup>18</sup>

Rising again challenges the same findings of fact by the trial court as contested in the denial of spousal support. As these findings were supported by evidence and not erroneous, they will not be disturbed on appeal. Despite upholding the trial court's findings of fact, this Court

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<sup>13</sup> *Id.* at 158, 160-163.

<sup>14</sup> *Moore*, 242 Mich App at 654.

<sup>15</sup> MCR 3.211(B)(3); *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003).

<sup>16</sup> *Berger*, 277 Mich App at 716-717.

<sup>17</sup> *Id.* at 717.

<sup>18</sup> *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996).

nevertheless must decide whether the dispositive ruling was fair and equitable.<sup>19</sup> The trial court's distribution of the marital assets equally between the two parties is indisputably fair and equitable. Yet, Rising takes exception to the trial court's requiring her to reimburse her husband for her wasting of marital assets. Specifically, Rising was ordered to reimburse her husband \$14,487.75 for the invasion of various bank accounts and \$5,916.47 for plundering two IRA accounts. Based on its determination that Rising improperly invaded and removed marital assets, such a distribution and offset is equitable and proper. There can be no legitimate dispute that Rising's husband was wronged by her conduct and that the trial court's requirement that she reimburse him does not comprise punishment but was consistent with the principles of equity.

The offsets mandated in the property division fully addressed Rising's conduct and should not have been used by the trial court in determining the propriety of an award for spousal support. The trial court acknowledged that one of its goals was to "restore" the husband to the place the parties were in at the outset of litigation and before Rising wasted marital assets. While this goal is both valid and consistent with the principles of equity, the trial court's disposition of the marital property fully addressed this issue and did not need to have it infringe on the separate issue of spousal support, which effectively afforded disproportionate weight to a single factor.<sup>20</sup>

### III. ATTORNEY FEES

Rising next contends that the trial court erred when it denied her motion for attorney fees. A trial court's decision to award attorney fees is reviewed for an abuse of discretion<sup>21</sup> and its factual findings are reviewed for clear error.<sup>22</sup>

While there is no entitlement to attorney fees as of right, fees may be awarded "when a party needs financial assistance to prosecute or defend the suit."<sup>23</sup> Rising failed to prove that she needed further financial assistance. The record shows that Rising paid her counsel \$10,000 as of the final date of trial. While her counsel claimed that he was owed an additional \$7,000, his argument did not directly address whether his client could afford to pay that amount or that the fee was earned. Rather, the unmistakable tenor of counsel's argument was that he should be paid the additional monies because it would be equivalent to the amount paid by the husband for his attorney's fees. Initially, the court ordered both attorneys to refrain from billing their clients until the court issued its opinion. On January 6, 2009, the court issued its opinion and found that the parties were to be responsible for their own attorney fees and determined that Rising's motion for attorney fees was frivolous resulting in an award of \$500 in sanctions.

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<sup>19</sup> *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

<sup>20</sup> See *Sparks*, 440 Mich at 158, 160-163.

<sup>21</sup> *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001).

<sup>22</sup> *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005).

<sup>23</sup> *Id.*

The trial court's decision to make each party responsible for their attorney's fees did not constitute an abuse of discretion. The trial court determined that Rising had secreted vast sums of the marital monies and was uncooperative regarding the disclosure of the status of her individually held accounts. While not specifically asserted, the trial court could have presumed that Rising retained the improperly procured funds and was capable of covering her own attorney fees. Accordingly, we cannot conclude that the trial court's disposition of this matter was unreasonable and Rising's assertion of error fails.

Rising also argues that she is entitled to receive attorney fees for her appellate counsel. "[A] party who requests attorney fees and expenses must allege facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay."<sup>24</sup> But it is not evident why the award of any appellate fees would be warranted as Rising's appellate counsel admits that he "is being funded" by trial counsel "out of his own pocket." If Rising is not responsible for the fees then she does not require aid in prosecuting the appeal and her claim fails.

#### IV. CONCLUSION

We affirm the trial court's property division and attorney fee awards. The judgment of divorce is reversed solely on the issue of spousal support and we remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Joel P. Hoekstra

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<sup>24</sup> MCR 3.206(C)(2).