

STATE OF MICHIGAN  
COURT OF APPEALS

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LINDA FRANGIE,

Plaintiff-Appellee,

v

CHARLES FRANGIE,

Defendant-Appellant.

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UNPUBLISHED

November 15, 2002

No. 236815

Macomb Circuit Court

LC No. 00-006618-DO

Before: Griffin, P.J., and Gage and Meter, JJ.

MEMORANDUM.

Defendant appeals as of right from a judgment annulling his marriage to plaintiff. We affirm in part and reverse in part. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the trial court erred in denying his motion to adjourn trial because two defense witnesses were not present. We review the court's ruling for an abuse of discretion. *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996).

A motion to adjourn must be based on good cause. MCR 2.503(B)(1). An adjournment may be granted because of the unavailability of a witness or evidence, but "only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence." MCR 2.503(C)(1), (2). Assuming without deciding that the trial court committed error, we find no basis for reversal because the error was undoubtedly harmless. *Vergote v K Mart Corp (After Remand)*, 158 Mich App 96, 109; 404 NW2d 711 (1987). The witnesses' testimony was relevant to the issue of the division of property and was rendered unnecessary by defendant's subsequent stipulation that each party retain the property in his or her possession.

Defendant next contends that the trial court erred in granting plaintiff attorney fees. The trial court's ruling on this issue is also reviewed for an abuse of discretion. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999).

Attorney fees in a divorce action are not recoverable as of right. *Kurz v Kurz*, 178 Mich App 284, 297; 443 NW2d 782 (1989). An award of reasonable attorney fees is authorized when one party is unable to bear the expense of the litigation and needs assistance to prosecute or defend the complaint for divorce and the other party has the ability to pay. *Kosch, supra*; *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997); MCR 3.206(C)(2).

Plaintiff owed her attorney \$6,200 plus additional fees for services rendered at trial. She contended that despite a gross income of \$37,000 a year, she could not afford to pay her attorney because she had a lot of expenses. She never said what those expenses were and whether they were necessary or discretionary. Moreover, she did not allege facts sufficient to show defendant's ability to pay. Given the absence of any evidence to substantiate plaintiff's claim that she was unable to bear the expense of litigation or to show that defendant had the ability to pay a portion of her attorney fees, we conclude that the trial court abused its discretion.

Affirmed in part, reversed in part.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Patrick M. Meter