

STATE OF MICHIGAN
COURT OF APPEALS

EDUARDO MARQUEZ,

Plaintiff-Appellant,

v

MARISELA MARQUEZ,

Defendant-Appellee.

UNPUBLISHED

March 16, 2004

No. 244308

Lenawee Circuit Court

LC No. 01-24004 DM

Before: Kelly, P.J. and Murphy and Neff, JJ.

PER CURIAM.

Following a contested child custody and divorce trial, the trial court entered a judgment awarding defendant sole legal and physical custody of the minor children as well as child support and spousal support. Plaintiff appeals as of right raising as his sole issue the spousal support provision in the judgment of divorce. We affirm.

I. Basic Facts and Procedural History

After a short courtship, the parties were married on May 22, 1997. Their first child was born in July 1998; the second in June 1999; and the third in May 2000. Defendant's four-year-old son from a previous relationship also resided with the parties.

With the exception of one short period, defendant was a stay-at-home mother throughout the marriage while plaintiff provided the family's sole financial support. The parties enjoyed a financially stable lifestyle. In 2000, plaintiff earned slightly over \$103,000. He testified that in 2001 he would earn between \$85,000 to \$90,000. The parties purchased a home valued at \$155,000 and accumulated numerous items of personal property, including a large screen TV, an extensive bear collection, a sports card collection, two vehicles and other items normally associated with a middle class lifestyle.

In May 2001, plaintiff moved from the marital home after being charged with domestic violence. In June 2001, plaintiff was again charged with domestic violence. After this second charge, defendant left the marital home with the children taking clothing, a limited amount of household and children's items and the bear collection. By court order, plaintiff obtained exclusive possession of the home, although it is uncontested that he never resumed residence there, electing instead to reside at his grandmother's home. Plaintiff maintained the marital bills until June 2001 and thereafter ceased making any payments. As a result, the home went into

foreclosure. Although the trial court entered a child support order, plaintiff did not provide any support to defendant until it was deducted from his paycheck through income withholding. Defendant successfully applied for and received financial aid and food stamps from the state. Although the parties had two vehicles, initially defendant was unable to use either. She ultimately was provided the down payment for a vehicle from the state via Michigan's "Work First" program. She was also provided day care assistance from the state after obtaining employment as a case manager with a salary of \$23,000.

After trial, the trial court awarded defendant \$549 per week for child support¹ and \$250 per week for four years as spousal support. With regard to the spousal support award, the trial court found that despite being awarded exclusive use of the marital home, plaintiff deliberately failed to protect it against foreclosure. It further found that plaintiff deliberately dissipated marital assets² and failed to account for the \$7,414 tax return, an approximate bonus of \$6,000 and a "\$600 Bush tax refund." The trial court further found:

We look at the situation of the parties. Defendant lived in a house that cost \$155,000 and had \$25,000 plus in home improvements. She had a large screen TV worth \$1,500 or more. She lived on an income that was in the hundred thousand dollar range. At times it was more than that – from him alone. She took care of the children, her family, her husband to the breaking point while her husband was gone, his hour and a half drive to two hour drive to work, up to twelve hours or more at work, plus school. She should not have to leave the living hell she endured in this marriage to a life of poverty.

At the time of separation she and the taxpayers became the sole support of the children for a while. She now has to accumulate furniture and furnishings, big and small appliances, dishes, pots, pans even food supplies that he dissipated. She'll have to make payments on those things because she certainly doesn't have the cash to buy them. I'm considering all of this in both the property and spousal support questions.

* * *

I think that spousal support should be retroactive but if I did that, I don't know how it would ever be collected. In the year 2001, he'll earn, and again I can't tell you exactly, but in the neighborhood of \$90,000. I'm very close. She will earn \$23,000. If he were to pay her \$250 a week, or \$13,000 a year, he would have a net income – net gross income of \$77,000. She would have a net gross income of \$36,000. But, even after paying this \$13,000 a year spousal support, his income –

¹ This figure included \$175 for childcare.

² The trial court found that plaintiff's sale of marital assets at a garage sale violated a mutual injunction against disposing of marital assets sought and received by plaintiff early on in the divorce proceedings.

his gross income would still be twice more, more than twice the gross income she would have.

* * *

Commencing today's date, plaintiff will pay the defendant, as spousal support, the sum of \$250 per week which will continue for four full years.^[3] This is a limited time and I'm doing this so she can straighten her life around. I'm doing it for all the reasons I mentioned including the fact that the property settlement, she's certainly entitled to something for this and there's just no other way that I can do to arrange this.

II. Standard of Review

The trial court's factual findings are reviewed for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). The findings are presumptively correct and the burden is on the appellant to show clear error. A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been made. *Beason, supra* at 804-805; *Moore, supra* at 654-655. If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992); *Moore, supra* at 655. The trial court's decision as to alimony must be affirmed unless the appellate court is firmly convinced that it was inequitable. *Sparks, supra*; *Gates v Gates*, 256 Mich App 420, 433; 664 NW2d 231 (2003).

III. Factual Findings

Plaintiff argues that several of the trial court's factual findings were clearly erroneous and were given disproportionate weight. We disagree. The award of alimony is in the trial court's discretion. *Gates, supra* at 432. Among the factors which should be considered are: (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. *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).

³ The trial court noted that this spousal support award reduced plaintiff's child support obligation by \$72.

A. Past Relations and Conduct

On appeal, plaintiff first contends that the trial court penalized him for “his unavailability to his family during their short-term marriage.” But a review of the record reveals that the trial court took into account the past relations and conduct of the parties during the marriage and did not limit its findings simply to “plaintiff’s unavailability.” The trial court considered the ongoing nature of both spousal and child abuse during the marriage, plaintiff’s failure to support his family during the separation leading defendant to seek governmental assistance and plaintiff’s dissipation of marital assets despite a mutual injunction that restrained both parties from “selling, disposing of hiding, destroying personal property of the parties.” Contrary to plaintiff’s assertion that the trial court gave disproportionate weight to the issue of fault, we find that fault was but one factor the trial court considered in analyzing the past relations and conduct of the parties and it was not given disproportionate weight.

B. Length of Marriage, Ability to Work, Age and Health of the Parties

Plaintiff also argues that the trial court failed to consider the length of the marriage, defendant’s ability to work, and the age and health of the parties. We disagree as the trial court specifically found that “this marriage is of a very short length, four and a half years. The parties are 30 and 31 respectively. The health of the parties is generally good.” When awarding spousal support, the trial court limited the award to four years, recognizing that it would be that long until the youngest child would start school and defendant’s opportunity to either work longer hours or seek further education would be limited. We find no clear error.

C. Ability to Pay

Next, plaintiff contends that the trial court erred in determining his ability to pay support. We find this argument to be without merit. The trial court found that in 2000, plaintiff made approximately \$103,000 and in 2001 was on track to earn approximately \$90,000. Contrary to plaintiff’s position on appeal, these findings were supported by plaintiff’s own testimony and exhibits. Moreover, plaintiff’s assertion that the “overtime hours he was once accustomed is a thing of the past” is without any evidentiary support in the record. To the contrary, plaintiff’s income has always included overtime and his failure to take advantage of overtime coincided with the filing of the divorce action. Under certain circumstances, the voluntarily unexercised ability to earn income may be considered. *Moore, supra* at 655; *Healy v Healy*, 175 Mich App 187, 191-192; 437 NW2d 355 (1989). Such circumstances include when the reduction was made to avoid paying alimony, *Healy, supra*. The trial court’s finding that plaintiff had the ability to pay spousal support was not clearly erroneous.

D. Present Situation and Need

Plaintiff further argues that the trial court clearly erred in its findings regarding defendant’s present situation and need, as well as her prior standard of living. We again disagree. During the marriage, the parties purchased a home that was valued at approximately \$155,000 and had made \$25,000 of improvements. When plaintiff vacated the marital home, he ceased making any mortgage payments and after being awarded exclusive use of the home continued to refuse to make payments. As a result, the home went into foreclosure and the equity in the home was lost. Plaintiff also failed to maintain payments on the parties other

marital debt. Additionally, the trial court found that plaintiff “surreptitiously” disposed of the personal property of the parties despite a court order prohibiting him from doing so. As a result, defendant went from being in a position of relative financial stability, to a lifestyle where she is encumbered with pre-marital debt and the sole assets she received were stock worth \$600; half of the Ford pension worth \$1700 and the bear collection. The trial court did not err in finding that defendant would need short-term spousal support to rebuild her life.

E. Property Settlement

Finally, plaintiff argues that the trial court erred in awarding spousal support because the property settlement was more than adequate to compensate defendant for her share of the marital estate. However, as the trial court noted, there was very little evidence presented as to the assets and liabilities of the parties. The trial court determined that plaintiff had dissipated the marital estate, failed to produce any documentation in his control to support his assessment of the marital estate, and lacked credibility as to his testimony on the parties’ financial situation. We give deference to the trial court’s ability to judge the credibility of witness. *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998). In addition, the trial court noted that although plaintiff’s premarital debt had been retired during the course of the marriage, defendant’s pre-marital educational loans remained outstanding which would remain her sole obligation and she did not have the current resources to retire that debt. Finally, because plaintiff had either disposed of, or failed to account for the marital assets, the trial court was unable to equitably divide the marital estate itself, thereby concluding that the spousal support award also encompassed a marital division she would have been entitled to receive. Upon review of the record, these findings were supported by the evidence and not clearly erroneous.

The trial court’s findings of fact were supported by the evidence and exhibits produced at trial. We find no error.

IV. Fairness and Equity

Because we find the trial court’s findings of fact not to be erroneous, we must next decide whether the dispositional ruling was fair and equitable in light of the facts. *Sparks, supra* at 151-152; *Moore, supra* at 655. The trial court’s decision as to alimony must be affirmed unless the appellate court is firmly convinced that it was inequitable. *Sparks, supra*; *Gates, supra* at 433. The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party, and alimony is to be based on what is just and reasonable under the circumstances of the case. *Moore, supra* at 654.

We disagree with plaintiff’s position that the award of \$250 per week for four years violates the principles of fairness and equity. Here, plaintiff and the children were subjected to physical abuse during the marriage and financial abuse following the separation. She was forced to seek governmental assistance to provide food and shelter for her and the children. She received a grossly inadequate share of the marital estate because plaintiff had either dissipated assets or failed to account for them, despite being in his sole possession and control.

As the trial court determined, plaintiff’s income for 2001 would be approximately \$90,000. Defendant’s income at the time of trial was \$23,000. Spousal support in the amount of \$250 a week, or \$13,000 a year, would result in a net gross income to the plaintiff of \$77,000.

Defendant's net gross income would be \$36,000. As a result, even after paying the spousal support, plaintiff's gross income would still be twice that of defendant. The trial courts award was fair and equitable under the circumstances.⁴

V. USCA § 1673

Plaintiff argues that the trial court erred in awarding spousal support in an amount that violates the statutory limitation on garnishment. USCA § 1673(2)(B). Plaintiff's position is without factual or legal merit.

First, at the time of trial, plaintiff's income was approximately \$90,000, not \$60,000 as he now asserts on appeal. Moreover, plaintiff testified and the trial court found that because plaintiff worked for the auto industry, his pay would vary from week to week depending on overtime. The trial court reasoned:

Now we normally compute support based on annual incomes. Now certainly, support from any working person in the auto industry will go up and down week to week and month to month and quarter to quarter and annually, but over the next 17 years it will average out pretty much if we go on an annual basis. The courts are simply too busy to change support each week, or month, or quarter to adjust for irregular overtime and/or annual bonuses or slowdowns, speedups, or whatever.

The trial court's approach in determining the weekly amount of support was fair, reasonable and factually supported by the record.

Second, plaintiff provides no authority to suggest that USCA § 1672(2)(B) must be taken into account when setting spousal support. It is the trial court's responsibility to determine the appropriate amount of spousal support.. Enforcement of that award may be effectuated pursuant to statute. MCL 552.608 As our Supreme Court explained in *Genesee County Friend of the Court v General Motors Corp*, 464 Mich 44, 46; 626 NW2d 395 (2001):

The Support and Parenting Time Enforcement Act (SPTEA) provides for income withholding orders to enforce support orders entered in domestic relations and paternity actions. The friend of the court is given various responsibilities for enforcement of those income-withholding orders.

* * *

⁴ On appeal, plaintiff contends his income is only \$60,000. First, we note that the record is devoid of any factual support for this assertion. Second, to the extent that \$60,000 may represent his current income, this evidence was not before the trial court when it heard this matter and we will not consider it on appeal. "This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

In addition, the act incorporates federal law with regard to the maximum percentage that may be withheld. MCL 552.608 provides:

The total amount of income withheld under this act under all orders to withhold income for current support, past due support, fees, and health care coverage premiums effective against a payer shall not exceed the maximum amount permitted under section 303(b) of title III of the consumer credit protection act, Public Law 90-321, 15 USC 1673.

15 USC 1673(b) sets those limits as follows:

(2) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed—

(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and

(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week; except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve week period workweek.

As clearly indicated, this statutory scheme is limited to the percentage of income that can be withheld from a payor's paycheck; in no manner does it relate to the setting of the initial amount of support to be awarded. Typically, upon receipt of an income order of withholding, the employer will deduct those payments required to be withheld by law, such as taxes and social security. Thereafter, the employer would deduct that amount from the remaining funds the amount of the support order, subject to the statutory limit of withholding, and forward that payment to the Friend of the Court for payment to the support recipient. As such, the statute is simply a method to calculate what amount is to be withheld and is irrelevant to a trial court's determination as to whether spousal support should be awarded and in what amount.

Affirmed. Costs to defendant.

/s/ Kirsten Frank Kelly

/s/ William B. Murphy

/s/ Janet T. Neff