

**Court of Appeals, State of Michigan**

**ORDER**

COLLEEN JAIKENS (MONTGOMERY) v JAMES W. JAIKENS

HILDA R. GAGE  
Presiding Judge

Docket No. 244497


PATRICK M. METER

LC No. 91-409499-DM

KAREN M. FORT HOOD  
Judges

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The Court orders that appellant's motion for reconsideration is GRANTED. The opinion shall be amended to include in our already-provided remand for recalculation of interest that the trial court address the application of the forfeiture provision contained in MCL 438.32.

  
HILDA R. GAGE  
Presiding Judge



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

NOV 04 2004

Date

  
Chief Clerk

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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COLLEEN JAIKINS, a/k/a COLLEEN  
MONTGOMERY,

Plaintiff,

v

JAMES W. JAIKINS,

Defendant-Appellant,

and

PLANTE & MORAN, LLP,

Appellee.

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UNPUBLISHED

August 10, 2004

No. 244497

Oakland Circuit Court

LC No. 91-409499-DM

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order awarding appellee Plante & Moran, LLP (Plante & Moran), expert witness fees and attorney fees. We affirm in part, reverse in part, and remand.

Defendant and plaintiff were divorced in August 1992. Plaintiff was awarded custody of the parties' four children and defendant was ordered to pay child support of \$2,500 a month. In 1994, each party filed a petition alleging an increase in the other party's income. In April 1995, in response to allegations that defendant was diverting business income in order to reduce his child support obligation to plaintiff, the trial court appointed an expert, Joseph Cunningham, a certified public accountant (CPA), with Plante & Moran, "to examine the corporate financial records to ascertain if, in fact, there has been a diversion of the Defendant's income to his wife and advise the Court accordingly." The order further provided that "any and all costs incurred in connection with said examination shall be equally split between Plaintiff and Defendant." Cunningham ultimately determined that there had been some income shifting and, by order of the court, submitted a report of his analysis and conclusions regarding the amount of money involved. Cunningham submitted bills for his services to both plaintiff and defendant. Plaintiff paid the large portion of her fee obligation, but defendant did not pay anything. When defendant continued to fail to pay his portion of Cunningham's bill, Plante & Moran petitioned the court and, following an evidentiary hearing, the court awarded Plante & Moran expert witness fees of

\$24,687.51, of which defendant was held responsible for \$18,657.51. The court subsequently entered another order awarding Plante & Moran attorney fees of \$9,730.95, of which defendant was held responsible for \$4,865.47.

On appeal, defendant argues that the trial court erred in requiring Cunningham to examine defendant's financial records to determine whether there had been income diversion and in ordering Cunningham to determine the specific amount of income that was diverted. Defendant contends that the court's orders constituted an improper delegation of a judicial function.

The appointment and qualification of an expert witness is within the trial court's discretion. MRE 706(a); *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 454; 633 NW2d 418 (2001). Giving opinion evidence on complex matters is, by definition, the province of an expert witness, even where the expert's opinion "embraces an ultimate issue to be decided by the trier of fact." See MRE 704, MRE 703, and *Zeeland Farm v JBL Enterprises*, 219 Mich App 190, 196; 555 NW2d 733 (1996). Whether an expert witness engaged in a judicial function is a question of law. We review questions of law de novo. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

In this case, the trial court did not abuse its discretion in appointing Cunningham, a CPA, to review defendant's complex corporate financial records for the purpose of determining whether defendant had improperly diverted his income. *Rickwalt*, *supra* at 454. In fact, the record discloses that defendant did not challenge below an assertion that Cunningham's appointment was by stipulation of the parties, and defendant's attorney advised the trial court in 1996 that "we agreed" to Cunningham's appointment. This Court will not find an error requiring reversal if the aggrieved party "contributed by plan or negligence" to the challenged circumstances. *Farm Credit Services v Weldon*, 232 Mich App 662, 683-684; 591 NW2d 438 (1998).

We also find no merit to defendant's claim that the trial court improperly delegated a judicial function to Cunningham. MRE 706(a) expressly authorizes the appointment of an expert witness, directs the court to inform the witness of his duties in writing, and requires the witness to advise the parties of his findings. This is what occurred here. Cunningham submitted reports and properly was permitted to give his opinion regarding the amount of defendant's income shifting. See MRE 704 (an expert witness may give an opinion on "an ultimate issue"). There is no indication that the trial court improperly delegated to Cunningham the responsibility for making the final determination regarding defendant's support obligations or that Cunningham offered a legal conclusion or told the trial court how to decide the case or interpret the law. Cf. *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 122-123; 559 NW2d 54 (1996). In fact, after the filing of Cunningham's reports, the parties ultimately negotiated and entered into a stipulated final order regarding child support. For these reasons, we reject this claim of error.

Defendant also challenges the trial court's award of expert witness fees. This Court reviews a trial court's decision to award expert witness fees for an abuse of discretion. *Rickwalt*, *supra* at 466. At the evidentiary hearing, defendant generally challenged the requested expert witness fees and questioned certain of the charges. It is apparent from the record that the trial court considered and weighed the relevant factors and arguments in determining the

reasonableness of the requested fees and properly exercised its discretion; apart from the interest portion of the trial court's award, we find no abuse of discretion. *Id.* Under the circumstances of this case, we disagree that Cunningham waived his right to fees or interest by failing to file a petition with the court, especially considering his testimony that he did not know such a petition was required. Moreover, we emphasize, in response to defendant's argument that plaintiff, as well as defendant, should have been charged with interest, the court's finding that "Plante & Moran has not requested interest on [p]laintiff's unpaid balance."

As noted, a portion of the fee award included interest on late fees. The trial court awarded interest at the requested rate of seven percent. We agree with defendant that it was improper for Plante & Moran to charge seven percent interest because defendant did not agree to this rate in writing. MCL 438.31. Accordingly, we reverse the trial court's order insofar as it awards interest on late fees at a rate of seven percent and remand for recalculation of the interest portion of the fee award based on the lower five percent rate prescribed by MCL 438.31.

Lastly, defendant argues that the trial court erred in awarding Plante & Moran attorney fees incurred in its collection efforts. As a general rule, attorney fees are not recoverable "in the absence of an exception set forth in a statute or court rule expressly authorizing such an award." *Persichini v Beaumont Hospital*, 238 Mich App 626, 639; 607 NW2d 100 (1999). However, a trial court has "inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney," including an award of attorney fees. *Id.* at 639-641. Where attorney fees are authorized, we review the trial court's award of attorney fees for an abuse of discretion. See *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998).

The trial court had an ample basis on which to award attorney fees, given defendant's failure to pay Cunningham in a timely manner. Indeed, although the trial court's original April 1995 appointment order provided that "any and all costs incurred in connection with [Cunningham's appointment] shall be equally split between Plaintiff and Defendant," defendant failed to pay any portion of his costs for five to seven years and required Plante & Moran to resort to collection proceedings to recover any fees. With regard to the reasonableness of the attorney fees awarded, the trial court specifically considered the professional standing, experience, and skill of the attorney involved. *Persichini, supra* at 644. Although the trial court declined to look at a survey offered by defendant on the issue of hourly rates, the court offered to conduct an evidentiary hearing if defendant wanted one, but defendant declined to pursue one. The trial court agreed with some of defendant's challenges and reduced the requested fee by omitting certain charges. The court considered the circumstances of the case and did not abuse its discretion in its award of attorney fees. *Id.*; *Schoensee, supra* at 314-315. Moreover, despite his arguments about judicial bias, defendant has not overcome the heavy presumption of judicial impartiality. See, generally, *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

Affirmed in part, reversed in part, and remanded for recalculation of interest in accordance with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage  
/s/ Patrick M. Meter  
/s/ Karen M. Fort Hood