

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM ERNEST KETELHUT,

Plaintiff/Counter-Defendant-
Appellee,

v

DIANNE KETELHUT,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED

November 13, 2007

No. 270733

St. Clair Circuit Court

LC No. 05-000215-DO

Before: Wilder, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. On appeal, defendant argues that the trial court's property division and spousal support awards are inequitable, and that the trial court erred by not fully deciding issues involving plaintiff's liability for interim expenses and defendant's health insurance, and by not requiring plaintiff to pay her attorney fees. We vacate the spousal support award in part to the extent that it limits support to only 36 months, remand for entry of an award of unrestricted spousal support, and we affirm in all other respects.

Defendant first argues that the trial court's decision to divide the marital property equally between the parties is inequitable, where plaintiff was at fault for the breakdown of the marriage. We disagree.

In divorce cases, an "appellate court must first review the trial court's findings of fact under the clearly erroneous standard." *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). "If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts." *Id.* at 151-152. Such rulings are "an exercise of discretion" which "should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable." *Id.* at 152.

The division of property is not governed by strict mathematical formulas; the division need not be equal, but it must be equitable in light of all the facts. *Id.* at 158-159. "[T]he following factors are to be considered wherever they are relevant to the circumstances of the particular case: (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. But the court may not assign disproportionate weight to any one circumstance. *Id.* at 162-163.

Here, the trial court’s opinion does not neatly separate its consideration of factors relevant to spousal support from its consideration of factors relevant to the division of the marital estate. Many of the factors identified by the court are relevant to each determination. See *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996). Concerning the past relations and conduct of the parties, the trial court found that defendant did not contribute to the breakdown of the marriage, but rather “suffered considerable abuse” by plaintiff. Thus, we agree with defendant that the trial court found that plaintiff was emotionally abusive and was at fault for the breakdown of the marriage, and disagree with plaintiff’s argument that the trial court’s finding of fault was intended to apply only to the issue of spousal support, not the property division.

Defendant does not argue that the trial court’s factual findings are clearly erroneous. Rather, she argues that its division of the marital property was not fair and equitable, particularly in light of its determination that plaintiff was at fault for the breakdown of the marriage.

A finding of extreme fault can justify an unequal property division. *Sands v Sands*, 442 Mich 30, 31-37; 497 NW2d 493 (1993). In *Sands*, an equal division of property was found to be inequitable in light of the husband’s devious and deceptive behavior, contentious conduct, and attempts to conceal assets. *Id.* at 36-37. Similarly, in *Welling v Welling*, 233 Mich App 708, 709-713; 592 NW2d 822 (1999), an alcoholic husband’s egregious conduct was found to justify a 60/40 division of property.

However, a court must not give disproportionate weight to a party’s fault. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996) (assault and financial wrongdoing); *Sparks, supra* at 162-163 (sexual infidelity). Additionally, “[m]arital misconduct is only one factor among many and should not be dispositive.” *Id.* at 163. The trial court’s goal is to achieve equity, not to punish the party it finds to be at fault, *Sands, supra* at 36-37, and a finding of fault is “not a punitive basis for an inequitable division.” *McDougal, supra* at 90.

Here, plaintiff’s fault was not the same caliber as the conduct in *Sands* and *Welling*. Although the trial court did not clearly err in finding that plaintiff was at fault, plaintiff’s fault was not so severe, overwhelming, or pervasive as to outweigh all other relevant factors. Considering all the relevant circumstances, we are not left with a firm conviction that the trial court’s decision to divide the marital estate equally was inequitable.

Defendant next argues that the trial court erred by awarding spousal support of \$2,000 per month for only 36 months. We agree. “A divorce court has discretion to award alimony as it considers just and reasonable.” *Magee, supra* at 162. “Relevant factors for the court to consider include the length of the marriage, the parties’ ability to pay, their past relations and conduct, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case.” *Id.* “The trial court should make specific findings of fact regarding those factors that are relevant to the particular case.” *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993). “The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party.” *Magee, supra* at 162.

The trial court found that the parties had been married for 25 years, and that plaintiff and defendant were 50 and 47 years old respectively at the time of the divorce. Plaintiff was in good health, whereas defendant had health problems. At the time of trial, defendant was unemployed; but defendant had worked a few days a week during the marriage, sometimes earning \$100 a day, and she had the ability to work full time. Conversely, plaintiff earned \$110,000 in 2005. The trial court determined that plaintiff, but not defendant, was at fault for the breakdown of the marriage. Once again, defendant does not argue that the trial court's findings of fact are clearly erroneous, but rather that the trial court's spousal support award is not just and reasonable in light of those findings, because, after 36 months, she will have to invade her share of the marital estate to support herself.

At trial, defendant testified that her monthly expenses would be \$3,000, if she had to pay the mortgage and all utilities. Defendant's COBRA health insurance coverage would cost an additional \$546 a month. Plaintiff was ordered to pay most of these expenses (absent the health insurance), and to pay interim support, until the marital home was sold. After the sale of the marital home, defendant will be responsible for most of these expenses in a new home. We believe that the trial court's decision to award support in the amount of \$2,000 per month is just and reasonable, considering defendant's expenses. Although it represents an approximate \$1,000 monthly reduction from the amount that plaintiff had been paying previously (for interim support and status quo payments), defendant was expected to obtain full-time employment (and did so). For these reasons, we conclude that the *amount* of the spousal support awarded was not unfair or inequitable.

Nonetheless, we conclude that the decision to limit spousal support to only 36 months was not fair or equitable considering all the circumstances. The parties were married for 25 years, during which time defendant was not employed outside the home. Defendant babysat part time during the week, but never earned more than \$7,000 a year. Defendant conceded that she began working full time on May 1, 2006, earning \$2,000 a month. Thus, defendant's gross income was approximately \$24,000 a year. But this was still significantly less than plaintiff's gross income of approximately \$100,000 a year, and given defendant's lack of education and work experience, it was unlikely that the parties' significant income gap would ever substantially decrease.

Defendant received half of the marital property, including half of plaintiff's retirement accounts. However, given her much lower income earning potential, it appears highly probable that she will have to invade her property distribution after 36 months in order to support herself. None of the property awarded to either party had income producing potential.

We conclude that the trial court's limitation of spousal support to 36 months is not just and reasonable in light of all the applicable factors, particularly defendant's limited work experience and income earning potential, her ill health, the length of the marriage, and plaintiff's fault for the breakdown of the marriage. Therefore, we vacate the spousal support award to the extent that it limits support to only 36 months, and remand for entry of an unrestricted award of spousal support, beginning with the sale of the marital home, subject to plaintiff demonstrating a substantial change in circumstances warranting a modification of the award. See MCL 552.28 (trial court may alter a divorce judgment respecting, inter alia, the amount of alimony); *Gates v Gates*, 256 Mich App 420, 434; 664 NW2d 231 (2003) ("The modification of an award of spousal support must be based on new facts or changed circumstances arising after the judgment

of divorce. The party moving for modification has the burden of showing such new facts or changed circumstances”).

Defendant next argues that the trial court erred by not requiring plaintiff to pay her attorney fees. We disagree. A trial court’s decision whether to award attorney fees is reviewed for an abuse of discretion. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999).

“A party in a domestic relations matter who is unable to bear the expense of attorney fees may recover reasonable attorney fees if the other party is able to pay.” *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999); MCR 3.206(C); MCL 552.13. “A party may not be required to invade her assets to satisfy attorney fees when she is relying on the same assets for her support.” *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). “Attorney fees also may be authorized when the requesting party has been forced to incur expenses as a result of the other party’s unreasonable conduct in the course of litigation.” *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995); see also *Schoensee v Bennett*, 228 Mich App 305, 315; 577 NW2d 915 (1998).

Defendant received half of the marital estate. She was receiving interim support of \$750 a month until she became employed and began earning \$2,000 a month. Plaintiff was paying the mortgage, property taxes, and utilities on the marital home. Defendant will be responsible for those expenses after the marital home is sold, but she will also begin receiving \$2,000 a month in spousal support in addition to her own income. Defendant failed to show that she would not be able to pay her attorney fees.

We also reject defendant’s argument that unreasonable conduct by plaintiff justified an award of attorney fees. Defendant testified that plaintiff threatened to leave her penniless. However, the trial court sustained objections to questions concerning plaintiff’s alleged failure to timely answer interrogatories and provide discovery. Thus, defendant has failed to show that plaintiff engaged in an unreasonable course of conduct, below or on appeal, that forced her to incur legal expenses.

For these reasons, the trial court did not abuse its discretion by denying defendant’s motion for attorney fees. For the same reasons, defendant has failed to show that plaintiff should be responsible for her attorney fees on appeal.

Lastly, defendant argues that the trial court erred by failing to rule on the issue of plaintiff’s liability for defendant’s health insurance coverage and plaintiff’s alleged arrearage for status quo expenses. We disagree.

Defendant testified that her health insurance continuation payments would be approximately \$546 a month. She also presented evidence that plaintiff allegedly owed approximately \$3,600 for expenses that defendant believed were covered by the trial court’s interim status quo orders. However, the evidence showed that the \$3,600 amount included many items that were outside the scope of the court’s interim orders, such as dog grooming and veterinary expenses for a dog belonging to the parties’ daughter, car maintenance, and other miscellaneous expenses. The only items that arguably can be classified as a utility (which plaintiff was ordered to pay), were defendant’s telephone bill, and possibly her internet/cable bill. In any event, the record discloses that the trial court resolved these contested issues.

In its April 17, 2006, opinion, the trial court explicitly ruled that plaintiff would be entitled to keep her health insurance coverage, but at her own expense. The court declined to order plaintiff to pay the overdue bills identified by defendant, and instead ordered him to continue paying defendant's mortgage, taxes, insurance, and utilities.

Defendant thereafter moved for reconsideration of the trial court's decision, asking that plaintiff be ordered to pay her health insurance continuation premiums for three years, but the court denied the motion. Defendant then moved to compel payment of the alleged status quo arrearages. Defendant asked the trial court to order plaintiff to reinstate cable/internet service to the marital home, and to pay defendant's car insurance and past due telephone bill. Defendant submitted an up-to-date list of the unpaid status quo expenses (cable/internet, telephone, and car insurance) totaling approximately \$2,000, this time omitting the veterinary, dog grooming, car maintenance, and other miscellaneous expenses.

At the hearing on defendant's motion, the trial court found that it had already ruled that plaintiff was not required to pay the contested expenses. As defendant asserts, the trial court did not specifically address the updated amounts of defendant's past due telephone and cable/internet bills. However, the court had already heard testimony concerning those expenses at trial, and declined to order plaintiff to pay them. Additionally, after the hearing on defendant's motion to compel payments, the court entered an order stating, "Defendant's Motion for Reimbursement of Unpaid Status Quo Obligations and Arrearages is denied." Therefore, while the telephone and cable/internet bills were not specifically and individually addressed at the hearing, the trial court ruled on defendant's request and denied her motion. There is no merit to defendant's argument that the trial court failed to decide these issues.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood