STATE OF MICHIGAN

COURT OF APPEALS

WALTER M. GRIFFIN, III,

Plaintiff/Counter-Defendant/Appellant-Cross-Appellee,

v

LISA LYNN GRIFFIN,

Defendant/Counter-Plaintiff/Appellee-Cross-Appellant.

UNPUBLISHED
November 15, 2007

No. 271194
Oakland Circuit Court
LC No. 2005-704615-DM

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

PER CURIAM.

In this divorce action, plaintiff appeals as of right the division of marital property, the calculation of child support, and the award of health insurance to defendant. Defendant cross appeals the modification to alimony. We affirm.

Plaintiff's first claim is that the trial court erred in awarding a disproportionate percentage of the marital assets to defendant when there was no finding of fault. For marital property division, we review a trial court's findings of fact for clear error and determine, in light of those facts, whether the ultimate ruling was fair and just. *Byington v Byington*, 224 Mich App 103, 109; 568 NW2d 141 (1997). Reversal is warranted "only if we are left with the firm conviction that the distribution was inequitable." *Id.* Equitable division in light of all the circumstances is the goal of marital property division pursuant to divorce. *Id.* at 114. Mathematically equal shares are not required, but "significant departures" must be explicitly justified by the court. *Id.* at 114-115. Factors to consider when dividing the estate include the "duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health, and needs, fault or past misconduct, and any other equitable circumstance." *Id.* at 115. An equal division need not be awarded without regard to fault, but an explanation by the trial court must accompany a significant departure from a mathematically equal share. *Id*. at 114-115.

The evidence adduced below established that plaintiff had a significantly greater income potential from his businesses because defendant had little work experience and raised the children for 14 years while plaintiff built those businesses. Given the disparity of the parties' earning capacity, the trial court's award of the Smith Barney account and a 60/40 split of a bank

investment and an annuity to defendant was fair and equitable particularly where plaintiff was awarded his various businesses.

Plaintiff's assertion that the trial court awarded defendant a disproportionate share of the marital property rests on his belief that his businesses had no value, and thus any award to defendant in exchange for her interests in his businesses was error. We disagree. We review the findings of fact underlying a trial court's asset valuation for clear error. *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988). "[W]here a trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present." *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). Review of the record reveals that the trial court held that the testimony of plaintiff's accountant with regard to the valuation of the businesses was not credible. The assertion that the businesses were not generating income was belied by the monthly expenditures and payments made by the mortgage company. We cannot conclude that the trial court's valuation was clearly erroneous in light of the trial court's assessment of credibility and the disparity between the valuation and the expenditures. Moreover, at the hearing on the motion to amend the judgment, the trial court inquired whether plaintiff would change course and approve a division of the businesses 50/50, but plaintiff's counsel did not accept the trial court's invitation. Under the circumstances in which the parties presented sparse proofs, the award was just and equitable.

Plaintiff next argues that his child support obligation is inflated because the trial court improperly calculated his salary and did not impute enough income to defendant. We disagree. We review child support awards for an abuse of discretion. *Morrison v Richerson*, 198 Mich App 202, 211; 497 NW2d 506 (1992).

The trial court must follow the formula in the Michigan Child Support Formula manual ("2004 MCSF manual") to set child support unless the result would be unjust or inappropriate. MCL 552.519(3)(a)(*vi*); MCL 552.605(2); *Burba v Burba* (*After Remand*), 461 Mich 637, 645-647; 610 NW2d 873 (2000); *Shinkle v Shinkle* (*On Rehearing*), 255 Mich App 221, 225-226; 663 NW2d 481 (2003). The 2004 MCSF manual does not dictate any particular time period for examining parents' financial records, but states that whenever possible, income should be "determined from actual tax returns." 2004 MCSF § 2.02(A), p 11. Further, the manual indicates that income averaging is the preferred approach in certain circumstances: "[c]ertain occupations and self-employed persons may have considerable variation in income from year to year. The use of three years' income information is recommended where such variation exists." 2004 MCSF Manual, § 2.01(C), p 9. Based on that language, the trial court had the discretion to determine how many years of plaintiff's financial data to use to determine his income. *Borowsky v Borowsky*, 273 Mich App 666, 685; 733 NW2d 71 (2007).

In accordance with the requirements of the 2004 MCSF manual, the trial court averaged plaintiff's W-2 income for 2003 (modified by subtracting a $100,000 one-time bonus) ($383,000 - $100,000 = $283,000), 2004 ($134,000), and 2005 ($120,000). Plaintiff argues this was in error because his 2005 W-2 income was not really income and his 2003 income was unusually high. This argument fails in part because the trial court is not limited to plaintiff's actual income in assessing his ability to pay support. *Reed v Reed*, 265 Mich App 131, 163; 693 NW2d 825 (2005). Additionally, in *Borowsky*, the plaintiff argued that the inclusion of an additional year's income would have substantially decreased his child support obligation. *Borowsky*, *supra* at

685-686. This Court held that "the mere fact that the outcome would have been better for plaintiff had the trial court examined the parties' financial data for 2002 is not, by itself, sufficient to warrant a conclusion that the trial court abused its discretion when it refused to do so." *Id.* at 686. Plaintiff's analogous argument that the trial court should not have used a particular income fares no better. An abuse of discretion occurs when the outcome chosen by the trial court is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). On this record, we conclude that the trial court's decision to average self-employed plaintiff's 2003, 2004, and 2005 income figures to determine plaintiff's child support obligation did not fall outside the range of reasonable or principled outcomes.

The trial court imputed to defendant a salary of $15,000. Plaintiff argues on appeal that it should have been closer to $30,000 because her W-2 from 1990 showed $31,000 and from 1991 showed $28,000. Imputing income is also within the discretion of the trial court. 2004 MCSF § 2.10(B), p 17. To impute income, the trial court must consider multiple factors:

> (1) Prior employment experience;
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> (2) Education level;
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> (3) Physical and mental disabilities;
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> (4) The presence of the parties' children in the individual's home and its impact on the earnings;
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> (5) Availability of employment in the local geographical area;
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> (6) The prevailing wage rates in the local geographical area;
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> (7) Special skills and training; or
>
> (8) Whether there is any evidence that the individual in question is able to earn the imputed income. [2004 MCSF Manual, § 2.10(B), p 8. Accord *Ghidotti v Barber*, 459 Mich 189, 199; 586 NW2d 883 (1998), quoting 1998 MCSF Manual, p 8.[1]]

Plaintiff's assertion that defendant's 16 and 17-year-old W-2s are an accurate reflection of her current earning ability is without merit based on the factors above as applied to the evidence. Defendant testified that she had not worked in at least 16 years, staying home to take care of the children, and prior to that she had worked as a claims handler straight out of college until she was laid off. She thought she could now get a job in retail and had applied for several.

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[1] There are minor word differences between the 1998 and 2004 factor lists that do not impact the applicability of *Ghidotti*.

Her sister working in Brighton in retail makes about $8.50 an hour. She wants to work part-time because she will have physical custody of all three children, each in a different school. Based on this evidence, the trial court's decision to impute only $15,000 in income to defendant cannot be said to have fallen outside the range of reasonable and principled outcomes. *Maldonado, supra* at 388.

Plaintiff's final claim on appeal is that the trial court erred in awarding COBRA benefits to defendant for three years when his company is not COBRA-eligible. The provision in the judgment of divorce awarding insurance contains several handwritten changes, which are initialed by counsel for both parties, making the insurance provision read as follows:

> Wife shall receive Cobra benefits from Village Mortgage, Inc., if available, for a period of three (3) years. Plaintiff/husband shall be responsible for and pay the cost of the Cobra premiums, or comparable health insurance, or until same is available through another source.

Having stipulated to the insurance provision by both revising and agreeing to the revisions, plaintiff may not now attack it on appeal. *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001).

Defendant's cross appeal asserts that the trial court improperly modified the original alimony award in the judgment of divorce based on an improper motion hearing brought by plaintiff. Although this issue is unpreserved for appellate review, this Court nonetheless may address it because it involves a question of law and the facts necessary for our disposition are before us. *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217 (2007).

Although the order in issue was entitled "OPINION AND ORDER AS TO MOTION FOR RECONSIDERATION," there is no doubt from the record that it was the opinion and order based on the motion to amend. MCR 2.119(F)(1) states that the court rule apples to rehearing or reconsideration "of the decision on a motion." Plaintiff was attacking a judgment based not on a motion, but a two-day trial. Plaintiff correctly cited to MCR 2.611 for a new trial or amendment of the judgment. A motion for new trial or to alter or amend the judgment must be filed with 21 days after entry of the judgment. The judgment of divorce was entered on April 13, 2006 and plaintiff's motion to amend was timely filed 20 days later on May 3, 2006.

Being in part a motion for new trial, the trial court properly set it for hearing with oral arguments. When hearing a motion for new trial, if the action was tried without a jury, MCR 2.611(A)(2)(c) and (d) allow the trial court to amend findings of fact and conclusions of law, and to make new findings and conclusions and direct entry of a new judgment. At the motion hearing, the trial court admitted that it thought it had made a mistake by having the alimony last 10 years and needed to address plaintiff's complaint that there were no findings in the record. Thus, the trial court acted properly, and plaintiff's challenge is without merit.

Affirmed.

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