# STATE OF MICHIGAN

# COURT OF APPEALS

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LINDA JOY NOVAK,

Plaintiff-Appellant,

v

DAVID FRANCIS NOVAK,

Defendant-Appellee.

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UNPUBLISHED
July 22, 2008

No. 275267
Livingston Circuit Court
LC No. 05-002745-DO

Before: Markey, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from a divorce judgment awarding her modifiable spousal support, challenging the inclusion of a cohabitation restriction in the support award, the trial court's determination of the amount of income imputed to defendant for purposes of determining spousal support, and the trial court's award of attorney fees. We affirm in part, and reverse in part and remand for a determination whether appellate attorney fees and costs are appropriate.

An award of spousal support is in the trial court's discretion and is to be based on what is just and reasonable under the circumstances of the case. *Thames v Thames*, 191 Mich App 299, 307; 477 NW2d 496 (1991). Although appellate review is de novo, the trial court's factual findings will be accepted unless they are clearly erroneous. *Id*. at 308.

In pertinent part, the divorce judgment awards plaintiff modifiable spousal support of $997 a month, and provides: "The spousal support shall continue until the Plaintiff becomes eligible for social security, remarries, cohabitates with an unrelated male, or death, or until further order of the Court." Plaintiff argues that the trial court abused its discretion by including the cohabitation provision for several reasons, including that neither party had requested such a provision.[1]

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[1] Plaintiff also asserts that the provision was unnecessary because the trial court expressly found that plaintiff was not cohabitating with another male, and that the provision is inequitable because it is not mutual, is ambiguous, and is against public policy.

We agree. Under the circumstance that neither party had requested a cohabitation provision, we vacate the phrase in the spousal support provision of the judgment that states "cohabitates with an unrelated male."

Plaintiff also requests that this Court modify the divorce judgment spousal support provision to state that support continues until her 65th birthday. Plaintiff notes that although the judgment provides that modifiable spousal support continue until she is eligible for Social Security benefits, it does not state whether that means age 62 or age 65. Plaintiff further notes that the alimony formula the trial court used recommended alimony for 14.7 years, and that she was 52 when the trial court issued its opinion, thus modifying the support provision to extend until she reaches age 65 comports with the trial court's opinion.

We agree with plaintiff. The alimony report the trial court based its award on states that plaintiff is 52 years old and recommends that "[p]ermanent alimony could be considered. Alimony should continue for 14.7 years." We thus further modify the spousal support provision to provide that "The spousal support shall continue until plaintiff reaches her 65th birthday, remarries, or death, or until further order of this Court."

Plaintiff also argues that the trial court erred in imputing annual gross income of only $65,000 to defendant. Conflicting evidence was presented concerning the sources and extent of defendant's income. As the trial court commented, attempting to ascertain defendant's income from the evidence and testimony presented was "like trying to tackle a greased pig."

Although plaintiff argues that the trial court should have relied on a mortgage loan application in which defendant reported a monthly gross income of $8,000 (or $96,000 per year), the application was completed several years earlier, and defendant's post-trial memo stated that plaintiff's brother handled the mortgage application and completed it, and that defendant did not read it before signing it. Under the circumstances, the trial court's decision not to impute income to defendant on the basis of the loan application was not clear error.

Despite defendant's claims that he was unable to work because of health problems, and evidence showing that defendant had earned little income in recent years, the trial court found that defendant was able to work in his field as a masonry contractor, and imputed income to him based on his masonry skills in Michigan's employment market. Given the conflicting evidence of defendant's income and capacity to work, the trial court's decision to impute income to defendant of $65,000 a year on this basis was adequately supported.

Plaintiff also argues that the trial court erred in awarding her only $12,000 in attorney fees and costs, rather than the requested amount of approximately $38,000. We disagree.

Attorney fees in divorce actions are not recoverable as of right. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). A party to a divorce action may be ordered to pay the other party's reasonable attorney fees if necessary to enable the other party to defend or prosecute the action, or where the party requesting payment of fees has been forced to incur them because of the other party's unreasonable conduct. *Id.*; MCL 552.13. The party requesting fees must allege facts sufficient to show that the party is unable to bear the expense of the action and that the other party is able to pay. MCR 3.206(C)(2)(a); *Kosch v Kosch*, 233 Mich App 346,

354; 592 NW2d 434 (1999). We review the trial court's decision whether to award fees for an abuse of discretion. *Stackhouse*, *supra* at 445.

Plaintiff sought recovery of attorney fees incurred throughout the entire action, however, the parties had agreed as part of their property settlement that they would each be responsible for their own attorney fees incurred through January 19, 2006. According to the documentation submitted, plaintiff was awarded the bulk of her attorney fees incurred after that date. Plaintiff failed to show that she was forced to incur the remaining attorney fees because of defendant's unreasonable conduct or that she was unable to bear the expense of those remaining fees. The trial court's decision to limit an award of attorney fees to $12,000 was not an abuse of discretion.

Plaintiff also requests appellate attorney fees, and costs of $5,000 plus transcript costs. MCR 3.206(C) provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> > (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
> >
> > (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

See also *Gates v Gates*, 256 Mich App 420, 439; 664 NW2d 231 (2003).[2] On remand, the trial court shall determine whether fees and expenses are appropriate under MCR 3.206(C).

We vacate the phrase "cohabitates with an unrelated male" from the divorce judgment's spousal support provision. We also modify the spousal support provision to provide that support

[2] In addition, this Court may award costs and attorney fees, on its own motion or that of a party, as a sanction for a vexatious appeal. MCR 7.216(C)(1); *DeWald v Isola (After Remand)*, 188 Mich App 697, 700; 470 NW2d 505 (1991). MCR 7.216(C)(1) is inapplicable, however, as plaintiff is the appellant in this case.

continue until plaintiff reaches her 65th birthday. We affirm the court's imputation of $65,000 annual income to defendant. On remand, the trial court shall make these revisions and also determine whether appellate attorney fees and expenses should be awarded plaintiff under MCR 3.206(C). We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Kurtis T. Wilder