

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM JOHN KENBEEK,

Plaintiff-Appellant,

v

MELANIE GAY KENBEEK,

Defendant-Appellee.

UNPUBLISHED

July 31, 2008

No. 277359

Kalamazoo Circuit Court

LC No. 06-005192-DO

Before: Murphy, P.J., and Bandstra and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's judgment of divorce, challenging the property division and the spousal support award. We affirm.

The parties were married on September 5, 1970, and separated on September 15, 2005. Plaintiff filed a complaint for divorce on January 26, 2006. At the time of trial, plaintiff was 56 years old; defendant was 54 years old. The couple raised four children together, two biological and two adopted, who are now adults. During the marriage, both parties worked outside the home. Defendant, however, left her last position in 1999 due to health issues and subsequently applied for and was granted Social Security disability.¹ Plaintiff owns his own business through which he installs and refinishes tile and hardwood flooring.

The divorce judgment directed that the marital residence be sold, with defendant receiving 65 percent, and plaintiff receiving 35 percent, of the equity. Additionally, the judgment provided that plaintiff pay 65 percent, and defendant pay 35 percent, of the couple's 2005 federal and state tax liability totaling more than \$21,000, and that plaintiff pay a \$1,991.38 debt to Bronson Hospital, for medical treatment received by defendant. The trial court initially ordered plaintiff to pay \$3,800 per month in temporary spousal support, but the judgment of

¹ Defendant suffers from fibromyalgia, which requires her to take several medications and has caused her to undergo several surgeries.

divorce called for payments of \$3,000 per month beginning once the marital residence was sold, or on August 1, 2007, whichever occurred first.²

Plaintiff argues that the distribution of the above assets and liabilities was inequitable, as the trial court made no finding of fault and offered no rational justification for the incongruent distribution. We disagree.

This Court reviews for clear error a trial court's factual findings relative to the division of marital assets or allocation of debt. *Dragoo v Dragoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made." *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002). If this Court upholds the trial court's findings of fact, it must then "decide whether the dispositive ruling was fair and equitable in light of those facts." *Id.* at 183. "A dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *Id.*

The following factors are relevant in determining the disposition of marital property in a divorce proceeding:

(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. [*Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992).]

There is no strict formula that must be followed; some of the factors may be relevant or weightier depending on the circumstances, and the trial court is given broad discretion in shaping its disposition. *Id.*, at 158-159. The ultimate property division must be equitable, though not necessarily equal. *Id.* at 159.

The trial court's factual determinations were not clearly erroneous with respect to the unequal division of the home equity. The trial court found that the parties' testimony was equally credible, that neither was more persuasive than the other, and that the parties were equally unsympathetic of the other's situation. The trial court is given special deference in determining the parties' credibility. *Johnson v Johnson*, 276 Mich App 1, 11; 739 NW2d 877 (2007). Moreover, the trial court struck a balance between the parties' positions. The court considered that: the parties had a long marriage of 36 years and raised four children together; both parties contributed to the family income over the years; both parties had serious health issues, but defendant's were currently more pressing and debilitating;³ defendant had a greater financial need due to her inability to work and her large medical bills; plaintiff was more capable

² The judgment of divorce also includes a specific division of the parties' personal marital property, however, plaintiff does not appeal that aspect of the judgment.

³ Plaintiff has had heart related health issues, and has been treated for cancer. However, there was no indication at trial that either prior condition was then impacting his daily life.

of earning an income; and the parties possessed few assets and had no retirement savings. It also considered the parties' age and education, their prior standard of living, the significant amount of time and effort defendant invested in the marriage and child rearing, the poor economy, and general principles of equity. While the trial court expressed sympathy for defendant's strong desire to remain in the marital household, it nonetheless ordered the residence to be sold because of defendant's inability to maintain the home due to her health condition, and her inability to pay plaintiff his share of the equity in the home. Based on these considerations, it awarded defendant 65 percent of the home equity. Defendant testified extensively about her medical condition and the physical limitations it placed on her. Her necessities, circumstances, and inability to work weighed in favor of the divergence from congruence in the division of the equity in the marital home. In reviewing the entire record, we conclude that the trial court's factual findings do not give rise to a definite and firm conviction that mistakes were made, and that the marital property disposition was equitable under the circumstances.

In reaching our conclusion we note that a trial court *may* consider fault when determining how to divide the marital property, although it may not be the sole factor. *Sparks, supra* at 158. The trial court herein determined there was no particular justification for finding fault. The record does not support plaintiff's contention that the trial court punished plaintiff for wanting a divorce and improperly considered fault in formulating the division of marital property.

An essential part of dividing marital property is the concomitant allocation of marital debt. The trial court explained that in light of defendant's poor health, her inability to work, and the "extreme amount of medical bills that [d]efendant will face in the future," plaintiff was assigned all of the \$1,991.38 Bronson Hospital debt, and 65 percent of the federal and state income tax delinquencies. Again, reviewing the entire record, we conclude that the trial court's factual findings do not give rise to a definite and firm conviction that mistakes were made, and that the allocation of marital debt was equitable under the circumstances.

Plaintiff next argues that the award of spousal support was inequitable, as there was no evidence that plaintiff was capable of paying that amount, or that he reduced payments as trial approached in order to avoid establishing a "precedent" for high spousal support. Rather, the evidence showed that plaintiff did not have enough income to make the payment. We disagree.

The factors that the trial court should consider in its spousal support determination 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).]

This Court reviews the trial court's findings of fact regarding its award of spousal support for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). "If the trial court's findings are not clearly erroneous, this Court must then decide whether the [support]

ruling was fair and equitable in light of the facts.” *Id.* at 654-655. Because a support ruling is an exercise of discretion by the trial court, it should be affirmed unless this Court is left with the firm conviction that it is inequitable. *Sparks, supra* at 151-152.

The trial court found that plaintiff had funds available to pay defendant spousal support, and this decision was not clearly erroneous. The court considered the factors mentioned above, in addition to the alleged failure of both parties to report some of plaintiff’s income during their marriage, and the fact that plaintiff initially paid defendant larger sums of money, and then reduced these payments as trial approached, possibly in order to avoid setting a “precedent” for the award of a higher support amount. This is similar to circumstances where a party voluntarily reduces his or her income in order to avoid paying spousal support, which may be considered by the court. *Moore, supra* at 655; *Healy v Healy*, 175 Mich App 187, 191-192; 437 NW2d 355 (1989).

The court considered both parties’ circumstances and arguments, and its decision was fair and equitable based upon those factors. The trial court’s decision was not a result of bias or passion, as plaintiff maintains. Rather, the court was not impressed with plaintiff’s failure to make a good faith effort to pay defendant a fair amount after a long marriage and in light of her disabled condition. “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.” *Olson, supra* at 631. The amount of support ordered, \$3,000, was \$800 less than the initial temporary spousal support order and the amount defendant requested. The court provided that the amount was open to review if plaintiff had his taxes done by an accountant and kept better records of his expenditures. The court also ordered defendant to present a medical treatment provider at any future hearings to testify as to her ability to work. As the decision was equitable in light of the facts, it will not be disturbed on appeal.

We affirm.

/s/ William B. Murphy
/s/ Richard A. Bandstra
/s/ Jane M. Beckering