

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN MARIE ENGERMAN,

Plaintiff-Appellee,

v

MATTHEW J. ENGERMAN,

Defendant-Appellant.

UNPUBLISHED
February 12, 2009

No. 281292
Kent Circuit Court
LC No. 06-010434-DM

Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant appeals by right from a judgment of divorce. Defendant challenges the trial court's division of marital property, its award of \$5,000 a month in spousal support for 12 years, and its decision to hold defendant liable for plaintiff's attorney fees in the amount of \$38,000. We affirm the trial court's award of spousal support and remand for further findings of fact regarding the valuation of assets, division of property, and attorney fees.

I

Defendant argues that the trial court failed to make sufficient findings of fact with respect to its division of the marital assets and may have used an improper method for calculating the value of certain financial accounts. He also argues that the trial court assigned disproportionate weight to his fault in causing the marital breakdown.

"In deciding a divorce action, the circuit court must make findings of fact and dispositional rulings." *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996). This Court reviews the trial court's findings of fact for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding is clearly erroneous if the appellate court, on all of the evidence, is left with a definite and firm conviction that a mistake has been made. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Special deference is given to the trial court's findings when they are based on the credibility of the witnesses. *Id.* If the trial court's findings of fact are upheld, this Court must then decide whether the dispositional ruling was fair and equitable in light of those facts. *Sparks, supra* at 151-152. "The court's dispositional ruling should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005).

The goal in distributing marital assets in a divorce is to reach an equitable distribution of property in light of all the circumstances. *Berger v Berger*, 277 Mich App 700, 716-717; 747 NW2d 336 (2008). The division need not be mathematically equal, but any significant departure from congruence must be clearly explained. *Id.* at 717. To reach an equitable division, the court should consider the duration of the marriage, the parties' contributions to the marital estate, each party's station in life, earning ability, age, health, and needs, fault or past misconduct, and any other equitable circumstance. *McDougal*, *supra* at 89; *Sparks*, *supra* at 158-160. The determination of relevant factors will vary with the circumstances of each case, and no one factor should be given undue weight. The trial court must make specific findings regarding the factors it finds to be relevant. *Sparks*, *supra* at 159. The determination of the proper time for valuation of an asset is within the trial court's discretion. *Gates v Gates*, 256 Mich App 420, 427; 664 NW2d 231 (2003).

While the parties' conduct during the marriage may be relevant to the distribution of property, the court must consider all relevant factors and may not assign disproportionate weight to fault or any single circumstance. *Sparks*, *supra* at 158, 162-163. In *Hanaway v Hanaway*, 208 Mich App 278, 297; 527 NW2d 792 (1995), this Court stated:

The relative value to be given the fault element in a particular case and the extent to which particular actions are regarded as fault contributing to the breakdown of a marriage are issues calling for a subjective response; such matters are left to the trial court's discretion subject to the requirement that the distribution not be inequitable. The trial court is in the best position to determine the extent to which each party's activities contributed to the breakdown of the marriage.

Defendant contends that the trial court failed to make sufficient findings of fact regarding the factors it found relevant to the division of assets. He specifically asserts that the trial court failed to make findings concerning the parties' health and failed to give due consideration to his explanation of the marital breakdown. The trial court specifically found that defendant's explanation of the marital breakdown was not credible. We defer to the court's determination of fault. *Dragoo*, *supra* at 429.

The trial court did not comment on the parties' health in its discussion of the property division, but it found that both parties were in good health when it addressed the issue of spousal support. This finding is not clearly erroneous, nor was this factor given insufficient weight in regard to the property division analysis. Defendant testified that his hypertension had worsened since the parties' separation and that he required stronger medication; however, there was no evidence that he was not able to successfully control his blood pressure. Furthermore, there was no evidence that this condition would affect the quality of his life or his earning capacity. The factors that the trial court emphasized most strongly—the duration of marriage, the parties' contributions to the marital estate, the parties' life status and their earning capacities—were all factors that were particularly relevant to the parties' standard of living before and after the divorce, and thus of greater significance to the property division. The trial court did not abuse its discretion by failing to assign greater weight to the health factor, nor did it fail to make sufficient findings of fact on this matter.

Defendant also argues that the trial court failed to make sufficient findings of fact regarding the valuation of the financial account assets. The trial court must make specific findings of fact regarding the value of the property awarded to the parties in a divorce. *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003). A trial court clearly errs when it fails to place a value on a disputed piece of marital property. *Id.* at 627-628.

The trial court stated, “I am taking the values here that were dated as of March 7th, but then adjusting those for the testimony of the defendant. What I’m doing, quite frankly, is simply awarding accounts to people whatever they’re [sic] present value is at this time.” The court did not specify whether it followed Dennis DeKok’s recommendation of taking into account the tax consequences of liquidating the financial accounts. Defendant argues that this omission makes it impossible to determine whether the trial court divided the assets along a 60/40 split, or a 72/28 split, thus precluding a determination whether the division was equitable.

We agree that the absence of specific findings of fact regarding these assets precludes a determination of whether the assets were equitably divided. Furthermore, as subsequently discussed, if the trial court took the tax consequences into consideration, it failed to make sufficient findings explaining why it did so. We therefore remand for specific findings of fact regarding the values assigned to each financial account, and the court’s basis for determining those values.

Defendant argues that if the trial court accepted DeKok’s valuation of the financial accounts as adjusted for the tax consequences of a present liquidation, it erred in doing so. He contends that any tax consequences were not relevant absent evidence that the parties intended to sell the assets in the near future.

The trial court has discretion to consider or decline to consider tax consequences in the distribution of marital assets. *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993). If the parties have presented evidence that causes the court to conclude that it would not be speculation to do so, it may consider the effects of taxation, stock brokerage and realtor fees, and other inchoate expenses in distributing the assets. *Id.* Here, defendant elicited DeKok’s admission that there would be no present tax consequences if plaintiff rolled the amounts into an IRA. The trial court did not make any findings as to whether or why tax consequences were relevant to its determination of value, or why they were not speculative. Without such findings, we cannot determine whether the trial court’s decision regarding this matter was clearly erroneous. *Sparks, supra* at 151; *Draggoo, supra* at 429.

The trial court’s failure to make sufficient findings of fact with respect to the values of assets prevents this Court from determining whether the property division was equitable. Although the trial court stated that it was dividing the property according to principles of fairness and equity rather than an exact number, some reliable degree of quantification is necessary to determine whether the overall division of property was fair and equitable under the circumstances. Therefore, while retaining jurisdiction, we remand this case to the trial court for further findings of fact regarding the values of the financial accounts and the court’s consideration of tax consequences, if any.

II

Defendant also challenges the trial court's award of spousal support. A trial court's award of spousal support is reviewed for an abuse of discretion. *Olson, supra* at 631. We review the trial court's findings of fact related to spousal support for clear error. *Id.* at 629.

The objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party. Support must be based on what is just and reasonable under the circumstances of the case. *Berger, supra* at 726. Among the factors that should be considered 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 support; (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. *Id.* at 726-727.

Here, the trial court's award of spousal support was based on factors (1), (2), (5), (10), (11), and (12). The court commented that "the most significant things . . . deal with prior standard of living. The parties[] station in life and standard of living establish a qualitative basis for determining the extent of the support duty." The court's findings regarding these factors are not clearly erroneous. Further, the court did not abuse its discretion in awarding plaintiff spousal support to avoid a significant decline in her standard of living following a 23-year marriage, the breakdown of which was not her fault, and where plaintiff's contributions as a stay-at-home mother and homemaker for many years enabled defendant to advance his career and earning capacity for the benefit of both parties, whereas plaintiff's career development was impeded. See *Demman v Demman*, 195 Mich App 109, 110-111; 489 NW2d 161 (1992).

We disagree with defendant's argument that the trial court's equalization of spousal income is inequitable because the quality of his living and working circumstances is disadvantageous compared to plaintiff's lifestyle. Defendant emphasizes that he works long hours, has little vacation time, and lives in an apartment in a city with a higher cost of living. Although these factors are relevant to a comparison of the parties' post-divorce standard of living, they do not establish that the trial court's award of spousal support was improper, especially when defendant voluntarily relocated to Milwaukee to advance his own career.

III

Defendant lastly challenges the trial court's award of attorney fees to plaintiff. This Court reviews a trial court's grant of attorney fees in a divorce action for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). The court's findings of fact are reviewed for clear error. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007).

MCR 3.206(C)(1) provides that a party to a divorce action may request the trial court to order the other party to pay all or part of the party's attorney fees. The party seeking attorney fees must allege facts sufficient to show either 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), or that attorney fees were incurred because the other party refused to comply with a previous court order, despite having

the ability to comply, MCR 3.206(C)(2)(b). The court may award attorney fees to enable a party to carry on or defend a divorce action. *Stallworth, supra* at 288. The party requesting attorney fees has the burden of showing facts sufficient to justify the award. *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007).

Here, the trial court explained that it was awarding plaintiff attorney fees of \$38,000 by awarding her the marital home, which had an equity value of \$76,000. But the court did not explain the basis for its determination that plaintiff was entitled to attorney fees. It did not make any findings regarding either plaintiff's ability to pay or the delays in litigation defendant caused. MCR 3.206(C)(2). Accordingly, on remand, the trial court shall explain the basis for its decision to award attorney fees and make appropriate findings of fact regarding this issue.

In sum, we affirm the trial court's award of spousal support but remand for further findings of fact regarding the valuation of assets, the division of property, and attorney fees. Additionally, in consideration of judicial economy, we suggest that Judge Mark Trusock again handle the matter on remand.

We affirm in part and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Jane E. Markey

/s/ William B. Murphy

/s/ Stephen L. Borrello