

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PAUL DAVID GUTMAN,

Plaintiff/Counter Defendant-  
Appellee,

v

BARBARA RUTH GUTMAN,

Defendant/Counter Plaintiff-  
Appellant.

UNPUBLISHED

May 12, 2009

No. 281655

Macomb Circuit Court

LC No. 06-001594-DO

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Before: Borrello, P.J., and Murphy and M.J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying her request for a new trial and challenging the trial court's denial of spousal support, award of property division, denial of health insurance premiums, and denial of additional attorney fees. For the reasons set forth in this opinion, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The parties were married on May 17, 1980, and separated in 2006. There were no children of the marriage. Plaintiff was the primary wage earner, with defendant only working part-time for short periods at various times in the marriage. Due to health issues, plaintiff retired in 2004 and began receiving Social Security disability benefits in 2006.

The parties equally divided the \$119,480 in proceeds from the sale of the marital home. They also equally divided a \$20,000 certificate of deposit. A pretrial order awarded \$12,000 to defendant and required plaintiff to pay \$1,300 of defendant's attorney fees. That order left it up to either the parties or the trial court to determine whether the \$12,000 was to be spousal support or property division. The trial court split the \$12,000 equally so that \$6,000 was temporary spousal support and \$6,000 was part of the property division.

The trial court ordered plaintiff to pay defendant half of the value of an annuity that was initially stated to be \$16,400, but had diminished to \$4,700 by the time of trial. Each party was given the right to name a 50% beneficiary on a universal life insurance policy that had benefits on both parties, and the policy premiums would continue to be paid out of the cash value. Both cars were awarded to plaintiff, including the one originally driven by defendant who at the time of trial said it was rusted out, had engine problems, and was not drivable. The trial court also

awarded defendant 53% of plaintiff's retirement account in an effort to balance the assets of the parties.

The trial court reserved the issue of future spousal support. Defendant's request for additional attorney fees was denied. Plaintiff was ordered to pay the April 2006 premiums for defendant's health insurance after which time defendant would be responsible for her own health insurance. Defendant was ordered to pay \$250 of a bill related to the marital home's security system.

Defendant argues that spousal support, attorney fees, and payment of health insurance premiums should have been granted and the property division was improper.

The same standard of review is applicable to this Court's review of both marital property divisions and awards of spousal support. *Berger v Berger*, 277 Mich App 700, 727; 747 NW2d 336 (2008). The trial court's factual findings are reviewed for clear error. *Id.* Factual findings are accorded substantial deference, but will be considered "clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made." *Id.* at 717. In divorce cases, the trial court is in the best position to view and weigh the witness's demeanor and credibility. *Stoudemire v Stoudemire*, 248 Mich App 325, 339; 639 NW2d 474 (2001). Special deference is given to a trial court's findings that are based on credibility. *Dragoo v Dragoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If the factual findings are not clearly erroneous, then this Court must determine whether the dispositional ruling was fair and equitable in light of the facts. *Id.* at 727.

MCR 3.211(B)(4) requires a judgment of divorce to include "a provision reserving or denying spousal support, if spousal support is not granted; a judgment silent with regard to spousal support reserves it." "The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party." *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003). The following factors should be considered to determine what is just and reasonable under the circumstances:

(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. [*Id.*]

Spousal support was explicitly reserved in the judgment of divorce. While the court rule directs courts to include such provisions, it also contemplates that if the trial court says nothing the issue is considered reserved. It is axiomatic that if a trial court can say nothing and reserve the issue, it can also explicitly reserve the issue without having to make findings on the applicable factors set forth in case law.

Additionally, even though the trial court did not specifically address the factors related to spousal support determinations, it did make relevant findings from the bench. The trial court

found that plaintiff was very ill and was not likely to enhance his position in the future, although he did have a source of income from Social Security disability benefits. The trial court also noted that defendant was a woman of strength who would find a way to succeed in the work force. Other findings included the long-term nature of the marriage (almost 27 years) and the property division, which included a 6% greater award to defendant from the largest retirement asset of approximately \$137,000. The trial court also noted the financial status of both parties.

Those findings clearly demonstrate the trial court's awareness concerning the length of the marriage, the parties' abilities to work, their present situations and needs, the health of the parties, the division of assets and general principles of equity when it made its final rulings. The trial court's findings of fact were not clearly erroneous and the decision to reserve support was equitable in light of the factors discussed by the trial court.

Defendant's argument that the trial court erroneously limited the review of spousal support is without merit. The judgment of divorce states that "spousal support is reserved and to be reviewed upon Plaintiff, Paul David Gutman, securing employment." Such a statement does not limit review of spousal support only to the circumstance of plaintiff acquiring a job, but rather that is one specific circumstance when the issue of spousal support is to be reviewed.

When making a determination of property division there are also factors to consider. *McDougal v McDougal*, 451 Mich 80, 88-89; 545 NW2d 357 (1996). Even though not all factors will be relevant in every case, the trial court must make specific findings of fact regarding the factors that are relevant. *Id.* The following factors are to be considered when they are relevant to the circumstances of a 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 89.]

In this case, the trial court found that the parties had a long-term marriage during which plaintiff was always the breadwinner despite health issues. The court also found there had been marital problems over the last six or seven years with defendant attempting to leave or actually leaving on more than one occasion. As stated previously, the court also made findings concerning the parties' earning abilities with defendant having the ability to better her position in the workforce, whereas plaintiff was in poor health and not likely to change his position. Plaintiff did, however, have more income coming in than defendant, and in an attempt to equalize their relative situations, the trial court awarded defendant 53% and plaintiff 47% of the largest retirement account consisting of approximately \$137,000.

Those findings of fact made by the court addressed the following relevant factors for consideration in property division: the length of the parties' marriage, the health of the parties, the necessities and circumstances of the parties, their earning abilities and general principles of equity. See *McDougal*, *supra* at 89. The trial court's findings of fact were supported by the record and not clearly erroneous.

Also concerning the disposition of assets, the trial court awarded defendant \$8,200 based on the value of an account that was initially stated to be \$16,400 but was diminished to \$4,700 by trial. Defendant also received \$12,000 based on the preliminary order, and was awarded \$1,300 in attorney fees in that order. Further, the house and certificate of deposit were divided equally among the parties.

The trial court's dispositional rulings were reasonable and equitable considering that there were limited resources, most assets were divided equally, and the division of the largest asset favored defendant along with the pretrial order providing her with \$6,000 in cash property.

Defendant also claims that plaintiff had access to additional funds based on a form signed by him nearly three years prior to the trial, and based on a statement in defense counsel's closing arguments that was not supported by any evidence. Although the trial court did not specifically address this issue, based on the silence in the judgment of divorce, it is clear that the court did not believe the items referred to on the 2004 asset transfer form were still in existence separate from the assets divided as marital property. We cannot determine based on the record before us the exact relationship between the assets referred to on the 2004 form and the marital assets at the time of separation and divorce. The trial court was in the best position to hear plaintiff's testimony regarding the 2004 asset transfer form and to view his demeanor. *Stoudemire v Stoudemire*, 248 Mich App 325, 339; 639 NW2d 274 (2001). In light of plaintiff's testimony regarding the 2004 form and the trial court's superior position to view that testimony, we cannot conclude that the trial court clearly erred in failing to specifically find there were additional funds based solely on the 2004 asset transfer form.

This Court has held that health insurance premiums may be considered part of the marital property division. *Voukatidis v Voukatidis*, 195 Mich App 338, 339; 489 NW2d 512 (1992). Defendant argues that she cannot afford health insurance premiums and that plaintiff should be required to pay them. Because the property division was equitable, requiring plaintiff to pay additional sums each month for defendant's health insurance premiums would erroneously shift the equity of the dispositional ruling.

A trial court's ultimate decision to award or deny attorney fees is reviewed for an abuse of discretion. *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007). "An abuse of discretion occurs when the trial court's decision falls outside of the range of reasonable and principled outcomes." *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008). Additionally, this Court reviews a trial court's factual findings for clear error in a decision to award attorney fees. *Reed v Reed*, 265 Mich App 131, 165; 693 NW2d 825 (2005).

"A trial court may order one party to a divorce to pay the other party's reasonable attorney fees and litigation costs if the record supports a finding that financial assistance is necessary because the other party is unable to bear the expense of the action." *Olson, supra* at 635. The party seeking attorney fees must show that said 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). Attorney fees may also be awarded where one party's misconduct caused the incurrence of attorney fees. *Reed, supra*; MCR 3.206(C)(2)(b).

Defendant argues that she should not be required to invade her assets when she is relying on those assets for support. But defendant has not shown that she cannot pay her attorney fees.

Nor has she alleged unreasonable conduct on the part of defendant causing her to incur excessive and unnecessary fees.

The trial court's denial of attorney fees beyond the \$1,300 awarded to defendant in the pretrial order did not fall outside the range of reasonable outcomes given that she received slightly greater than half of the marital property, both parties testified to invading their assets on a monthly basis to meet their living expenses, defendant did not show that she is unable to pay the fees, and defendant did not allege unreasonable conduct by plaintiff creating additional and unnecessary attorney fees.

Affirmed.

/s/ Stephen L. Borrello  
/s/ William B. Murphy  
/s/ Michael J. Kelly