

STATE OF MICHIGAN
COURT OF APPEALS

PAUL MICHAEL NAJT,

Plaintiff-Appellee,

v

PATRICIA MADELYN NAJT,

Defendant-Appellant.

UNPUBLISHED

May 14, 2009

No. 281548

Oakland Circuit Court

Family Division

LC No. 2006-720792-DM

Before: Murray, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgment of divorce. We affirm in part, but remand to the trial court for a hearing regarding the parties' rights to, and value of, plaintiff's Merrill Lynch IRA.

Plaintiff was the only witness to testify at trial. He explained the events leading up to the divorce, which included defendant's false allegations that, among other things, plaintiff was a homosexual and sexually abused their children. Plaintiff testified that the allegations abated after defendant admitted herself to a psychiatric hospital and received medications. He also testified that, when defendant reduced her medications, she renewed her allegations. Plaintiff testified that defendant's psychiatrist, Dr. Elliot Luby, recommended that defendant medicate with Respridol. However, to plaintiff's knowledge, defendant refused medication for all but five to ten days during the divorce proceedings. The direct examination concluded and trial was adjourned for nearly two months.

During the adjournment, the guardian ad litem requested the release of Dr. Luby's records. Defendant filed a written objection asserting her physician-patient privilege. She objected to the proposed admission of her medical records and Dr. Luby's proposed testimony. She also requested that the trial court exclude any evidence regarding her mental health or medical care. When the trial resumed, the trial court precluded defendant from cross-examining plaintiff with respect to her mental health.

Defendant's first claim on appeal is that the trial court abused its discretion, see *Persichini v William Beaumont Hosp*, 238 Mich App 626, 632; 607 NW2d 100 (1999), when it precluded her from cross-examining plaintiff regarding his testimony that she needed and refused medications.¹ Defendant argues that the privilege should have only excluded evidence of her private communications with Dr. Luby, not her cross-examination of plaintiff. We agree that there was an abuse of discretion in limiting the cross-examination of plaintiff, but conclude that the error was harmless. See *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 693; 630 NW2d 356 (2001); MRE 103(a).

Pursuant to MCR 2.314(B)(1), "A party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to his or her mental or physical condition." See *Landelius v Sackellares*, 453 Mich 470, 475; 556 NW2d 472 (1996). There is no doubt that defendant had a valid privilege with Dr. Luby pursuant to MCL 333.18237 (psychologist-patient privilege), MCL 600.2157 (physician-patient privilege), and MCL 330.1700(h), 1750(1)-(3). See *Baker v Oakwood Hosp*, 239 Mich App 461, 469; 608 NW2d 823 (2000); *Kilbride v Kilbride*, 172 Mich App 421, 432; 432 NW2d 324 (1988). Therefore, defendant could assert her privilege to prevent the discovery of medical information relating to her mental condition. MCR 2.314(B)(1); *Landelius, supra* at 475. Even though defendant failed to assert her privilege until trial was underway and plaintiff's testimony had already addressed some of defendant's mental health issues, the trial court recognized defendant's assertion and precluded Dr. Luby's testimony.

MCR 2.314(B)(2) limits a party's presentation of evidence following the party's assertion of the privilege. It provides that,

if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition.

See, also, *Hyde v University of Michigan Bd of Regents*, 226 Mich App 511, 520-522; 575 NW2d 36 (1997) (Because the plaintiff asserted his physician-patient privilege, he could not offer testimony regarding his noneconomic damages, including mental anguish, outrage, embarrassment and humiliation.). Here, defendant asserted the psychiatrist-patient privilege when plaintiff subpoenaed Dr. Luby. The trial court quashed the subpoena, upholding the assertion of the privilege. But the privilege prevents the disclosure of *confidential*

¹ Defendant also argues that the trial court abused its discretion by precluding her from cross-examining plaintiff regarding his testimony of her behavior over the preceding several years, including his claims that she verbally or emotionally abused the children. However, the record shows that defendant cross-examined plaintiff regarding whether she engaged in behavior that scared the children. She also questioned him regarding his claims that her behavior resulted in calls to the police. Further, defendant addressed plaintiff's testimony with respect to her sexual abuse, drug abuse, and homosexuality allegations.

communications between defendant and Dr. Luby; it does not prevent testimony of a layperson such as plaintiff regarding his ordinary observations of defendant's actions or statements made outside the context of her confidential relationship with Dr. Luby. See generally, *Baker, supra* at 470. Thus, it was an abuse of discretion to limit defendant's cross-examination of plaintiff that was intended to cover his observations about defendant's conduct that occurred outside of her treatment session with Dr. Luby.

Nevertheless, for several reasons the error was harmless. First, defendant has not shown, and we cannot conclude, that the cross-examination would have had an impact on the relief awarded by the trial court. As discussed below, the trial court's distribution was fair and equitable, and to the extent that it was disproportionate, it was not based upon plaintiff's mental health. Second, as noted in footnote 1 of this opinion, defendant was allowed to cross-examine plaintiff over his testimony regarding defendant's behavior at the house, with her family and in the community, thus putting plaintiff's direct examination testimony to the test. Indeed, the only area of cross-examination that was actually limited was regarding plaintiff's direct testimony about defendant's medication, which was an insignificant issue relative to plaintiff's testimony regarding defendant's *conduct*, and that testimony was subject to cross-examination. Accordingly, we hold that the error in limiting the cross-examination was harmless.

Defendant's second argument on appeal is that the trial court failed to consider all of the spousal support factors when it awarded her \$2,500 per month for eight years and COBRA expenses for three years. She maintains that such consideration would have resulted in a more equitable award, and urges this Court to take the unusual step of making the spousal support award permanent and increasing plaintiff's monthly payment.

This Court reviews a trial court's factual findings for clear error. *Berger v Berger*, 277 Mich App 700, 727; 747 NW2d 336 (2008). If the factual findings are not clearly erroneous, "this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Id.* The trial court's spousal support award must be affirmed unless this Court is "firmly convinced that it was inequitable" and the trial court abused its discretion. *Id.*

A trial court has discretion to award spousal support. *Id.* at 726. "The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case." *Id.* Factors that trial courts should consider include:

(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.* at 726-727, quoting *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).]

In the instant case, trial court premised the award on plaintiff's ability to pay, the parties' current earning differential, and defendant's needs as evidenced by plaintiff's budget, the only

evidence of defendant's expenses admitted at trial. It was not clear error to find that these factors supported the trial court's award.² Indeed, the award will afford defendant a standard of living similar to that which she had prior to the divorce, including rent for an apartment near the marital home, which features a pool, tennis courts, cable and internet. The only evidence of defendant's costs showed that this award would allow defendant to maintain an appropriate standard of living for eight years, which will also give her time to become re-employed. Although the spousal support and COBRA payments constitute only 16 percent of plaintiff's monthly gross income, plaintiff is responsible for the mortgage on the marital home and custody of the couple's daughter. Also, there is no evidence that the spousal support will leave defendant impoverished. Therefore, the trial court's spousal support award did not constitute an abuse of discretion.

Defendant also argues that the trial court abused its discretion by: 1) refusing to order plaintiff to pay her attorney fees, and 2) failing to equalize the parties' difference in attorney fees paid from the marital assets when it divided the equity of the marital home. We disagree. This Court reviews a trial court's ruling on a request for attorney fees and the division of property award for an abuse of discretion. *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008); *Berger*, *supra* at 726.

Pursuant to MCL 552.13 and MCR 3.206(C), a court may authorize attorney fees in domestic relations cases. *Smith*, *supra* at 207. The party requesting attorney fees must prove that he or she is "unable to bear the expense of the action, and that the other party is able to pay." *Id.*, quoting MCR 3.206(C)(2)(a).

Defendant requested that the trial court order plaintiff to pay \$25,000 toward her attorney fees. However, pursuant to MCR 3.206(C)(2)(a), defendant was required to show that she was unable to bear the expense of the action. The trial court concluded that she failed to meet this burden. Notably, most of defendant's attorney fees were paid from the marital estate. Therefore, relatively few fees remained for defendant to pay following the judgment of divorce. And, because the spousal support award equitably supported defendant's everyday needs, it was not an abuse of discretion for the trial court to require defendant to pay for the remaining attorney fees by seeking employment or from her property division award. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993) ("A party may not be required to invade her assets to satisfy attorney fees when she is relying on the same assets for her support.").

Next, defendant challenges the trial court's failure to equalize the parties' difference in attorney fees when it divided the equity of the marital home. During the divorce proceedings, the parties paid their attorney fees with their marital savings and an equity line of credit from the marital home. However, these fees were disproportionate; plaintiff incurred approximately \$90,627.99 in attorney fees, whereas defendant incurred approximately \$75,000 in attorney fees.

² Defendant attached as an exhibit to her appellate brief a document containing calculations establishing what she believes to be a more appropriate spousal support award. However, the exhibit was not submitted to the trial court, and cannot therefore be considered on appeal. MCR 7.210(A)(1).

The difference in attorney fees paid from marital assets was \$15,627.99. Thus, when the equity was divided equally, defendant bore the burden of nearly \$7,814 of plaintiff's attorney fees.

A trial court should consider the following factors when it disposes of marital property:

(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).]

Factor (9), the general principles of equity, is particularly relevant to this case. Arguably, plaintiff paid a larger portion of his attorney fees out of the marital assets than did defendant. However, plaintiff testified that he incurred additional legal fees, in part, because of defendant's actions. Plaintiff and his counsel made numerous court appearances due to defendant's frightening behavior during parenting time, her refusal to control spending, and her failure to comply with a court order regarding the couple's equity line of credit. Furthermore, the facts suggest that defendant also depleted marital assets for separate purposes. Defendant allegedly said that she "had the luxury to spend as much as she wanted because [plaintiff] was spending money on a lawyer." At trial, plaintiff itemized some of defendant's luxury purchases: \$500 on jewelry, several hundred dollars on purses, and \$2,000 on the children's Christmas gifts. Plaintiff testified that, during the divorce proceedings, defendant spent more than he and the children spent altogether. Weighing plaintiff's disproportionate attorney fees due, in part, to defendant's behavior against defendant's disproportionate spending, this Court is not left with the firm conviction that the division of equity of the marital home was inequitable. The trial court did not abuse its discretion in when it failed to equalize the parties' difference in attorney fees in this division.³

Finally, plaintiff and defendant argue that the judgment of divorce should be amended to reflect their stipulation for the equal division of the marital portion of plaintiff's Merrill Lynch IRA. We agree.

Pursuant to MCL 552.101(4):

Each judgment of divorce . . . shall determine all rights of the husband and wife in and to all of the following:

(a) Any pension, annuity, or retirement benefits.

³ Defendant also challenges the trial court's order as it relates to parenting time monitor fees and GAL fees. She maintains that it was inequitable to impose an equal burden for these fees given the parties' disparity in incomes. However, defendant did not include this challenge in her statement of questions presented. Therefore, it is not properly before this Court. See MCR 7.212(C)(5); *Weiss v Hodge*, 223 Mich App 620, 634; 567 NW2d 468 (1997).

(b) Any accumulated contributions in any pension, annuity, or retirement system.

(c) Any right or contingent right in and to unvested pension, annuity, or retirement benefits. [*Mixon v Mixon*, 237 Mich App 159, 164-165; 602 NW2d 406 (1999).]

The parties failed to admit plaintiff's Merrill Lynch IRA statement at trial and plaintiff only estimated his pre-marital contribution to the account. The trial court stated that it could not determine the present value of the pre-marital portion without the statement. Consequently, the trial court properly declined to consider the IRA in the division of the parties' assets. However, in order to comply with MCL 552.101(4), we remand for an evidentiary hearing, during which the parties may offer evidence of the current value of the IRA and plaintiff's pre-marital contribution. Thereafter, the trial court should amend the judgment of divorce to include its determination regarding the parties' rights to the IRA.

We affirm the trial court's judgment of divorce, but remand to the trial court for a hearing regarding the parties' rights to plaintiff's Merrill Lynch IRA. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Elizabeth L. Gleicher

/s/ Michael J. Kelly