

STATE OF MICHIGAN
COURT OF APPEALS

KAREN LYNN LANSKY,
Plaintiff-Appellee,

UNPUBLISHED
May 21, 2009

v

JAMES JOHN LANSKY,
Defendant-Appellant.

No. 284112
Delta Circuit Court
LC No. 07-018871-DM

Before: Whitbeck, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

Defendant James Lansky appeals by right from a judgment of divorce that the trial court entered that included provisions ordering James Lansky to pay spousal support to plaintiff Karen Lansky in the amount of \$2,000 a month and awarding Karen Lansky the proceeds from certain insurance claims. We affirm.

I. Basic Facts And Procedural History

The parties married in 1982 and divorced after 25 years in 2007. In 2007, the Lanskys were both 50 years old. Karen Lansky did not graduate from high school and said that she had never applied for, or otherwise sought to complete, a GED. Karen Lansky testified that she worked only for a short time, managing a resort, for the first two and a half years of the marriage. She said that while working at the resort, she took reservations and cleaned the hotel, and James Lansky did most of the grounds work outside. Karen Lansky testified that she currently had no marketable skills. She stated that James Lansky told her that he wanted her to stay home and that he did not like her leaving the house for any reason. She stated that James Lansky worked for Canadian National Railway for 20 years and that he was the sole source of income during the marriage.

Karen Lansky also testified that she had a job opportunity doing childcare work in Kentucky, for which she attended classes and earned certification, but that she could not take the job because she was unable to move in time. She said that between November 2005 and September 2007, she picked up one employment application, but she could not return it because she was too sick to do the job. She stated that her earning abilities had declined because of reoccurrences of fibromyalgia and migraines. She indicated that she had migraines since she was 25 years old and was diagnosed with fibromyalgia in 2003. She went on to say that when the fibromyalgia flared up it was like a “bad, bad flu . . . it’s pain everywhere so that you can’t—

sometimes . . . I've been so stiff, I couldn't even move my baby toe." Defense counsel objected to Karen Lansky's health-condition testimony on the ground that her assertion of privilege in connection with her medical records made her testimony regarding her poor health as inadmissible, and the trial court agreed.

Karen Lansky further testified that she could not hold down a full-time job as of September 2007, because of her health condition. She added that her long-term plans were to obtain some new job skills and enter the work force. She stated that she had not applied for disability payments through social security because she did not plan to stay sick.

James Lansky testified that he expected his annual net take-home pay to be \$57,729 for 2007, basing the estimate on eight months of paycheck history. On that same basis, the trial court calculated that James Lansky was on track to make gross wages of \$89,500 for the year. James Lansky stated that his gross income for 2006, as shown on his Form 1040, was \$100,161. He added that his earnings in 2007 were lower than in previous years because he was no longer working out of town, or generating overtime by working six and seven days a week. He continued:

Q. Okay. But you've been off on medical leave?

A. Six weeks.

Q. Okay. And you got paid eighty percent?

A. Eighty percent.

Q. Of your income for that eight [sic] week period?

A. Yes.

Q. That would contribute to your income being lower this year, wouldn't it?

A. Twenty percent for six weeks, no.

Q. That would contribute to you—

A. No.

Q. —income being lowered this year?

A. No.

Q. It wouldn't?

A. No. Because I was working six and seven days in Green Bay for the last five years. I'm on—

Q. I'm not asking about the previous five years, [James Lansky]. I'm asking about this year.

A. No.

Q. Your income would be lower this year because—

A. No.

Q. —because you were off more?

A. No.

Q. It wouldn't?

A. No.

Karen Lansky testified that, according to tax returns, James Lansky's earnings were \$114,700 in 2006; \$94,000 in 2005; \$86,000 in 2004; and \$88,000 in 2003.

With respect to an insurance claim, Karen Lansky testified that a storm in 2003 caused water damage in the marital home that affected much of the marital property. She reported that she had submitted paperwork to the insurance company for half of the claim at the time of the divorce hearing. She said that she received one check for \$29,000, which paid a portion of the credit cards that were used to replace the damaged items and several other smaller checks as well. She stated that she thought the balance to be submitted to the insurance company was about \$25,000.

Calvin Havinga, of Hughes and Havinga Insurance Agency, testified that his company provided insurance for the parties. Havinga stated that the parties received insurance payments of \$31,915.37 on November 8, 2004, and \$61,911.81 on May 2, 2006, for the water damage to the home. He reported that there were no outstanding claims yet to be paid.

After hearing Havinga's testimony, defense counsel moved the trial court to hold proofs open to secure copies of the insurance checks and other documents. Havinga informed the trial court that the insurance checks were all made payable to James Lansky and, in some cases, to a secondary company that was providing services on the home. The trial court requested that Havinga provide copies of the checks that were made payable to James Lansky on this claim to the trial court and to each of the parties. The trial court then stated as follows:

And to answer your question, I'm not going to delay anything on this one here. Discovery has been available, this file has been going on for eight and a half months, the information on something that was in existence back in 2006 should have been gathered by everybody here, and we're going to proceed with this—

James Lansky testified that he did not recall endorsing checks for the amounts of the insurance proceeds. He continued:

Q. Do you . . . recall endorsing any checks relative to the insurance claim in any way, shape, or form?

A. No, because [Karen Lansky] was the one that was submitting them all and taking care of everything. She was taking care of the credit cards and taking care of all the finances coming back from—and . . . doing all the paperwork I was working out of town, I don't have time to do that, that was what she did.

Q. So the payouts that were made between November of '04 and May of 2006 were approximately ninety-three thousand dollars, is that correct?

A. That is correct.

James Lansky additionally testified as follows:

Q. [James Lansky], if there is any surplus ever realized as a result of the insurance claims which we believe are still yet to be submitted to the carrier, would you have any objection to [Karen Lansky] having those?

A. No.

II. Spousal Support

A. Standard Of Review

James Lansky asserts that the trial court erred in awarding permanent spousal support of \$2,000 a month to Karen Lansky, arguing that the award was based on outdated income figures, did not account for Karen Lansky's ability to work, and improperly took into account Karen Lansky's health concerns. We review for an abuse of discretion a trial court's award of spousal support.¹ An abuse of discretion occurs where the trial court's decision falls outside the range of reasonable and principled outcomes.² We review for clear error a trial court's factual findings in relation to an award of spousal support.³ "A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made."⁴ If there is no clear error, this Court determines whether the dispositional ruling was fair and equitable in light of the facts.⁵

B. Legal Standards

Spousal support is awarded in order to balance the income and needs of the parties in a way that will not impoverish either.⁶ In determining the amount of spousal support, the court should consider "the length of the marriage, the parties' ability to pay, their past relations and

¹ *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).

² *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

³ *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000).

⁴ *Id.* at 654-655.

⁵ *Id.*

⁶ *Id.* at 654.

conduct, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case.”⁷

C. Income Figures

James Lansky argues that the trial court used outdated income figures to determine his ability to pay spousal support. The record indicates that James Lansky testified that he expected his annual net take-home pay to be \$57,729 for 2007 on the basis of eight months of paycheck history. The trial court in turn considered James Lansky’s *gross* annual income of \$89,500 and then deducted his business expenses. The trial court noted in its reasoning that it was considering only the current year’s income and not previous earnings. Regardless of the manner of calculation, the result is the same. James Lansky thus brings no error to light.

D. Karen Lansky’s Income Capacity

James Lansky argues that the trial court failed to account sufficiently for Karen Lansky’s skills and ability to work and also improperly considered health factors, resulting in an award of permanent spousal support instead of rehabilitative support. We disagree. The record indicates that Karen Lansky asserted that her medical records were privileged against disclosure, which made her testimony regarding her poor health inadmissible.⁸

The trial court recognized that Karen Lansky’s assertion of privilege prevented her health from being considered in the award of spousal support. The trial court stated, “With regard to the health of [Karen Lansky], it is not to be considered as she prevented [James Lansky] from getting access to her medical records, but her monthly health related expenses are considered.” Later, the trial court stated that spousal support could be revisited on a showing that Karen Lansky’s medical condition had deteriorated. James Lansky contends that the trial court’s statement about Karen Lansky’s medical condition “deteriorating” implies that the trial court considered her health condition in making its decision. This is simply not what the record shows. Although the trial court acknowledged that Karen Lansky may have a health condition, it clearly stated that it did not consider this factor in making its determination of spousal support.

Concerning Karen Lansky’s ability to work, the trial court noted that she had little opportunity for employment in light of her lack of education, work history, and age. We agree. Given that the parties were married for 25 years, with James Lansky as the sole source of income, that Karen Lansky provided care and home schooling for the children, and that Karen Lansky did not have a high school degree, we conclude that the award of spousal support was fair and equitable.

⁷ *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996).

⁸ See MCR 2.314(B)(2).

III. Marital Estate

A. Standard Of Review

James Lansky argues that the trial court erred by failing to account in the property division for over \$60,000 in insurance claim money that should have been treated as part of the marital estate and also in not granting his motion to reopen proofs in connection with those insurance claims. We review for clear error the trial court's findings of fact relative property distribution.⁹ "If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts."¹⁰

B. Insurance Claim

James Lansky argues that the trial court did not consider \$60,000 in insurance claim money as part of the marital estate. However, during the divorce hearing the trial court heard testimony from the Lanskys and the insurance agent regarding the insurance claims. The trial court, on its own initiative, even requested copies from the insurance company's agent of the checks relative to the insurance proceeds. Moreover, James Lansky testified to the amount of the proceeds and stated that he would not object to Karen Lansky's having the proceeds from any surplus realized on the claims that were yet to be submitted.

Although James Lansky argues on appeal that he was surprised by the insurance agent's testimony and that Karen Lansky acted in a fraudulent manner in withholding information on the insurance claims, we cannot credit those assertions. First, the insurance agent provided full details concerning the claims for the court's consideration. Second, James Lansky had every opportunity to obtain detailed information on the claims prior to the divorce hearing. In fact, the testimony included information about the status of the insurance claims and copies of the pertinent checks were provided to the court. Our review of the record shows that the trial court considered the full amount of insurance proceeds on more than one occasion and reached a fully informed conclusion based on the facts and circumstances. For these reasons, we reject the claim that the trial court failed to take into account the insurance proceeds in dividing the marital property. The trial court did not clearly err and the end result was fair and equitable to both parties.

Because we conclude that the trial court properly considered the insurance proceeds in dividing the marital property, we need not consider whether the trial court erred in denying James Lansky's motion to reopen proofs for further development of that issue.

Affirmed.

/s/ William C. Whitbeck
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher

⁹ *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992).

¹⁰ *Id.* at 151-152.