

STATE OF MICHIGAN
COURT OF APPEALS

DANA RUTH MORK,

Plaintiff-Appellee,

v

BRIAN JAMES MORK,

Defendant-Appellant.

UNPUBLISHED

June 23, 2009

No. 283270

Oceana Circuit Court

LC No. 06-006045-DM

Before: Beckering, P.J., and Wilder and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. On appeal, he challenges the trial court's division of property, and awards of child support, spousal support, and attorney fees. We affirm in part, reverse in part, and remand.

The parties met while they were both students at Hope College, and they married in 1984. Defendant proceeded to obtain a Ph.D. in analytical chemistry, while plaintiff discontinued her education after her second year at Hope College. Defendant served in the Air Force and the Air Force Reserves, and then he worked for several government defense contractors in California. Plaintiff's role during the marriage was a traditional wife and stay-at-home mother for the parties' four children (two of whom had reached adulthood by the time of trial), although she did engage in some part-time work. Defendant provided almost all of the parties' income. As the trial court noted, the "major stumbling block to maintaining the parties' marriage stemmed from differing viewpoints toward money management." Defendant carefully budgeted all expenses and income and "attempted to account for virtually every penny spent," which resulted in considerable financial accumulation, but plaintiff found defendant's approach to be extreme and controlling.

Plaintiff previously filed divorce actions in 1996 and 2000, but each time the parties reconciled and those cases were dismissed. In the summer of 2006, plaintiff and the two youngest children relocated to Michigan, where they lived with plaintiff's parents. In the fall of 2006, the second-oldest child enrolled in Hope College in Michigan. In December of 2006, plaintiff filed a complaint for separate maintenance, which was later amended to request a divorce. In 2007, when it appeared that plaintiff's move to Michigan was permanent, defendant moved to Michigan and accepted an assistant professorship and resident dormitory directorship at Hope College, which together provided him with a \$53,000 base salary, insurance, retirement, an apartment, and a meal plan. Furthermore, the second-youngest child's tuition is covered. The

parties sold their house in California and split the proceeds. Plaintiff is now employed part-time at a 911 dispatch center.

Among other determinations, the trial court concluded that defendant should be imputed an annual income of \$78,000, on the basis of his base salary, valuing his room and board at \$12,000, and “other earning capacity” equivalent to \$13,000. In April 2007, the trial court ordered defendant to pay child and spousal support based on his prior California income, retroactive to December 2006. The trial court decided to value the parties’ assets as of the date of trial. It listed various investment accounts that each party was to receive, but did not make specific findings regarding the value of each account. The trial court awarded plaintiff half of defendant’s Air Force pension, periodic spousal support of \$700 a month, and attorney fees incurred between November 28, 2006, and October 16, 2007.

Defendant first contends that the trial court made several erroneous findings of fact. We agree in part. This Court upholds a trial court’s findings of fact in a divorce action unless those findings are clearly erroneous. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). Special deference is given to a trial court’s findings when they are based on the credibility of the witnesses. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). A trial court must make specific findings of fact regarding the value of each disputed piece of marital property awarded to each party in the judgment. *Olson v Olson*, 256 Mich App 619, 627-628; 671 NW2d 64 (2003). A trial court’s findings of fact are inadequate if they are not sufficiently specific to enable the parties to determine the approximate values of their individual awards by consulting the verdict along with the valuations to which they stipulated. *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993). This Court further reviews whether the trial court’s dispositional rulings are fair and equitable in light of the trial court’s findings of fact, *Sparks, supra* at 151-152, but we reverse only if definitely and firmly convinced that the disposition is inequitable. *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005).

We first observe that the trial court attempted to divide the parties assets, aside from certain particulars, evenly between the parties. Many of those assets were financial accounts, and the trial court decided to use the date of trial as the valuation date for those accounts. Defendant argues that doing so was inequitable because he made investments into two of these accounts during the parties’ separation, from which plaintiff should not benefit. But the trial court found that defendant did so at a time when he was failing to pay his child support obligations. 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). Furthermore, that determination is exceedingly difficult when the value of an asset has changed since the parties have manifested an intent to leave separate lives. See *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997).

The court’s decision to not reward defendant for the savings he accumulated at the expense of his support obligations was not inequitable. Further, we are not persuaded by defendant’s argument that the accrued arrearage at the time of trial was artificially inflated, or that his payment of the arrearage by the time judgment was entered excuses his earlier noncompliance with the court’s support order. Defendant unilaterally decided to flout the trial court’s support order and to pay the support amounts into an account that he exclusively controlled. The trial court’s decision to hold in abeyance its decision on defendant’s motions to

adjust his support obligation based on his reduced income or to credit him for payments he voluntarily made was neither unjust nor unfairly prejudicial to defendant. Both of these motions required the trial court to make findings of fact on contested issues concerning defendant's imputed income and his financial support of plaintiff and the children following their separation. It was not unreasonable for the trial court to decide these matters at trial and then make any credits or adjustments that were appropriate. In sum, the trial court did not abuse its discretion in following the general rule to value the marital assets at the time of trial.

Defendant contends that the trial court erred by failing to make specific findings of fact regarding the values of certain financial accounts. As noted, the trial court stated that it was intending to divide the assets equally between the parties. However, the gravamen of defendant's argument is only that, because the evidence presented at trial consisted of valuations based on the date the parties separated, it is difficult or impossible to determine whether the trial court really did award fifty percent to each party. It is clear that the parties can readily ascertain precisely what they received from consulting the trial court's judgment, and they have access to the assets so awarded, so they can equally readily ascertain the value thereof. The trial court need not award mathematically precise equal shares, and we have not been presented with any convincing argument that any departure therefrom, if any, is significant enough to demand that the trial court explain itself. See *Byington v Byington*, 224 Mich App 103, 114-115; 568 NW2d 141 (1997). We are unable to conclude that the trial court's division of assets is inequitable under the circumstances.

Defendant contends that the trial court erred in awarding plaintiff half of his Air Force pension plan because there was no evidence that it was vested or that he would ever receive it. However, MCL 552.18(2) provides that contingent rights to unvested pension benefits payable to a party on account of service credit accrued during marriage may be considered part of the marital estate subject to division where just and equitable. See also *Quade v Quade*, 238 Mich App 222, 225; 604 NW2d 778 (1999). Because the trial court awarded half of the pension plan, we find no possible inequity or prejudice: whether or not the plan vests or pays anything, the parties each receive half. The fact that they may ultimately receive half of nothing does not constitute an error. Given the trial court's retention of jurisdiction in this matter, whatever pension benefits are ultimately paid – if any – can be distributed as they are received by defendant. *Boyd v Boyd*, 116 Mich App 774, 781-783; 323 NW2d 553 (1982).

Defendant also argues that the trial court erred in failing to include the Shelby State Bank savings account, the Wells Fargo account, and the USAA life insurance policy as marital assets.¹ He argues that the Shelby State Bank savings account should have been included because it contained funds that plaintiff previously removed from an Alta One marital account. Defendant's argument regarding the USAA life insurance policy and the Wells Fargo account, neither of which existed at the time of trial, is based on his contention that the trial court should have valued the marital estate as of the date plaintiff filed her complaint. Presumably, defendant would have preferred to have had the trial court consider these assets as part of the marital estate,

¹ The divorce judgment awarded plaintiff the Shelby State Bank savings account as her sole and separate property. The Wells Fargo account and the USAA life insurance policy are encompassed within the trial court's ruling that it would not make adjustments for marital assets consumed by the parties while the case was pending.

and their value awarded to plaintiff, thereby reducing the portion of remaining property awarded to plaintiff.

Although defendant suggests that plaintiff used the funds from these assets “for her pleasure and payment of attorney fees,” plaintiff testified that she used the funds for her living expenses. Defendant also criticizes plaintiff for spending \$42,000 to purchase a truck and \$6,414 in tithing. However, the truck money came from plaintiff’s share of the proceeds from the sale of the marital home, and plaintiff testified that she and defendant historically shared a moral belief in the importance of tithing. Under these circumstances, the trial court did not abuse its discretion by failing to use an earlier valuation date for these no longer existing assets such that they would be encompassed within the property distribution.

Regarding the Shelby State Bank account, the trial court determined that it should remain plaintiff’s property free and clear of any claims by defendant because plaintiff had been using it to deposit defendant’s child and spousal support payments. In light of plaintiff’s testimony that the original funds were consumed for living expenses and that the later deposits were from defendant’s support payments, the trial court did not abuse its discretion in declining to award a portion of this account to defendant.

In sum: we affirm the trial court’s division of assets.

Defendant next argues that the trial court erred in imputing income to him in calculating its award of child support. We agree in part. We review a trial court’s award of child support for an abuse of discretion, *Burba v Burba*, 461 Mich 637, 647; 610 NW2d 873 (2000), and its findings of fact for clear error, *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999). A trial court’s decision to impute income when a parent voluntarily reduces income or has a voluntarily unexercised ability to earn is also reviewed for an abuse of discretion. *Stallworth v Stallworth*, 275 Mich App 282, 286-287; 738 NW2d 264 (2007).

A parent’s child support obligation is based on the needs of the child and the actual resources of each parent, including a parent’s unexercised ability to pay child support. MCL 552.519(3)(a)(vi); *Ghidotti v Barber*, 459 Mich 189, 198; 586 NW2d 883 (1998). The imputation of income to a parent having an unexercised ability to pay must be conducted according to certain guidelines. *Id.* at 198-199. The court must make findings with respect to various factors, including, but not limited to, the parent’s work history, health, education level, skills, capacity to work, available employment opportunities, and consistency or diligence of effort in seeking employment. *Id.* The court must evaluate these criteria to ensure that any imputation of income is based on actual ability and likelihood of earning the imputed income. *Id.* at 199.

First, we reject defendant’s argument that the trial court should have imputed income to plaintiff. The trial court stated that it expected plaintiff to find full-time employment, and indicated that it was willing to review that matter later. In view of plaintiff’s limited work experience and qualifications, and her testimony regarding her unsuccessful attempts to find full-time employment before trial, it was not unreasonable for the trial court to allow her additional time to find a full-time job before imputing income to her based on an unexercised ability to earn.

We also reject defendant's argument that the trial court erred in imputing \$12,000 of additional income to him, in addition to his \$53,000 base salary, on the basis of his room, board, and meal plan at Hope College. We note that defendant had no work obligations for his summer term at Hope College, and so we are unpersuaded that imputation of additional income violates the prohibition against imputing income "on any hours beyond 40 per week nor any overtime or shift premiums." Michigan Child Support Formula of 2004 (MCFS) 2.10(G). An employer's provision of an allowance for rent is a type of income that may be included in determining a parent's income. 2004 MCSF 2.01(F)(27). Furthermore, 2004 MCSF 2.11(D)(2) provides that in-kind income should be included in a parent's income. The trial court's rejection of a suggested lower value based on a website was not an abuse of discretion, given that the website was hearsay and defendant failed to establish personal knowledge of the information. MRE 602, MRE 801(c); *Chmielewski v Xermac, Inc.*, 457 Mich 593, 614; 580 NW2d 817 (1998). The trial court's finding that the room and board benefit had a value of \$12,000, representing a value of \$1,000 a month for meal and living expenses, is not clearly erroneous.

However, we agree that the trial court erred in imputing an additional \$13,000 in income to defendant on the basis of the possibility of earning additional income from the Air Force Reserves or from working in private industry. Regarding the former, defendant presented uncontradicted evidence that there were no Air Force Reserves activities in Michigan that allowed him to continue this service. Regarding the latter, the testimony of plaintiff's vocational expert, Karen Starr, fails to provide support for the trial court's determination that defendant had an unexercised ability to earn a higher wage in Michigan. Although Starr identified several employment positions that purportedly matched defendant's educational and work experience, including 15 current openings in Michigan, her conclusions were not based on specific information pertaining to defendant's degree and actual work experience, but rather on unfounded speculation and generalizations. Regarding the positions at Eaton Corporation and GE Aviation, Starr was unable to connect defendant's qualifications to the job descriptions. She admitted that some of the positions on her list required an engineering degree or equivalent experience. Defendant did not have an engineering degree and Starr admitted that she was unfamiliar with defendant's specific job experience.

This analysis of defendant's employment potential in Michigan was based on data that was too general to support a conclusion that defendant could significantly increase his income by working in a private industry position in Michigan rather than at Hope College. An expert witness's conclusions must be supported by a sufficient factual basis. MRE 702; *Mulholland v DEC Int'l Corp.*, 432 Mich 395, 411; 443 NW2d 340 (1989); *Green v Jerome-Duncan Ford, Inc.*, 195 Mich App 493, 498; 491 NW2d 243 (1992). An expert's opinion is objectionable if it is based on assumptions that do not accord with the established facts. *Id.* at 499.

Starr's conclusions lacked a sufficient factual basis because they were based on unsupported assumptions regarding defendant's qualifications and the requirements of the job opportunities that she identified. Defendant's work experience involved the highly specialized fields of analytical chemistry and directed energy. Starr admitted that she was unaware of the differences between analytical chemistry, foundational chemistry, organic chemistry, and inorganic chemistry. Starr relied on general job descriptions, without acquiring knowledge of defendant's day-to-day experience in any of his jobs or in the jobs she believed he could obtain.

Furthermore, Starr's assessment of defendant's income earning potential was based on statistical data regarding median salaries in California and Michigan. Starr admitted that only one employer, Technicsource, provided her with specific income information. The trial court implicitly rejected Starr's salary analysis. It apparently gave little credence or weight to Starr's testimony that defendant was eligible for a position at Technisource that paid \$135,000, given that it expressly found that defendant could not earn as high a salary in Michigan as he had in California.

In sum, although the trial court did not err in considering defendant's room and board benefit at Hope College, or in valuing that benefit at \$12,000, for purposes of determining defendant's income, the court erred in imputing income to defendant on the basis that he had an unexercised ability to earn a higher wage in a private industry position in Michigan, or from his experience in the Air Force Reserves.

Defendant argues that the trial court erred in awarding plaintiff periodic spousal support of \$700 a month. Although we conclude that the trial court did not err in awarding periodic spousal support, in light of our conclusion that the trial court improperly imputed additional income to defendant, the trial court may deem it appropriate to redetermine the amount of support.

The objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party, and support is to be based on what is just and reasonable under the circumstances of the case. *Berger v Berger*, 277 Mich App 700, 726-727; 747 NW2d 336 (2008). 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 parties' prior standard of living 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. We review the trial court's findings of fact relating to an award of spousal support for clear error, *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000), and we review the ultimate award for an abuse of discretion. *Olson, supra* at 631.

Here, the trial court primarily relied on the length of the parties' marriage, plaintiff's contributions to the marriage as a stay-at-home mother, and plaintiff's diminished earning potential resulting from her lack of education and work experience to determine that spousal support was appropriate. The record supports the trial court's findings, and the trial court did not abuse its discretion in awarding spousal support in light of its findings. As noted above, we find no inequity in the trial court's property division award, and no error in determining that defendant's earning potential was substantially higher than plaintiff's. We disagree with defendant's argument that the trial court failed to give due consideration to plaintiff's ability to work full time, underestimated the length of time that she would be able to work and save for her retirement, disregarded the substantial value of plaintiff's share of the property division, and improperly considered the parties' standard of living throughout the marriage. The purpose of spousal support was to equalize the parties' positions.

Defendant also argues that the trial court's award of spousal support was improperly intended as child support. A trial court lacks jurisdiction to order child support for adult children, and it may not do so under the guise of ordering spousal support. *Lesko v Lesko*, 184 Mich App 395, 405; 457 NW2d 695 (1990). Here, however, there is no indication that the trial court's award of spousal support was intended as support for the parties' children.

Defendant also argues that the trial court abused its discretion in ordering "permanent" spousal support rather than rehabilitative support. He argues that plaintiff should eventually be able to start a career and support herself from increased earnings and from her accumulated award of spousal support. Under the circumstances, however, we find no abuse of discretion. Moreover, if plaintiff's circumstances should change in the future, such that continued spousal support may no longer be necessary, defendant may petition the trial court to modify spousal support based on changed circumstances. MCL 552.28.

Defendant lastly argues that the trial court erred in awarding plaintiff attorney fees. We review a trial court's decision to award 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 on which an award is based are reviewed for clear error. *Stallworth, supra* at 288.

In a divorce action, a trial court may award attorney fees to enable a party to carry on or defend the action, or because attorney fees were incurred because a party refused to comply with a previous court order, despite having the ability to comply. MCR 3.206(C)(2)(a) and (b); *Stallworth, supra* at 288-289. The party requesting the 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).

A party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support. *Gates, supra* at 438-439. The property division and the award of attorney fees "function in tandem," and a party may be ordered to pay the opposing party's attorney fees if that party was awarded insufficient liquid assets in the property division to pay the fees and costs. *Olson, supra* at 354.

In this case, plaintiff was unemployed after she left California until one month before the trial. During this time, she supported herself with assistance from her parents, payments from defendant, and by liquidating her Wells Fargo account and life insurance policy. Plaintiff also received a share of the proceeds from the sale of the marital home, which she used to purchase a new vehicle and to pay a portion of her attorney fees. Even with the assets that plaintiff received in the property distribution, we do not believe that the trial court clearly erred in finding that an award of attorney fees was justified to enable plaintiff to prosecute the action without invading assets that she was using to support herself. Further, the trial court did not clearly err in finding that defendant was able to pay attorney fees in light of his substantially higher income.

Defendant also argues that the trial court erred in finding that the case was unusually complex. Defendant presumably raises this argument in the context of questioning the reasonableness of the attorney fees awarded, because the complexity of a case is not a factor in determining whether attorney fees may be awarded under MCR 3.206(C)(1). We cannot disagree with the trial court's characterization of the case as complex, difficult, and "miserable." The imputed income issue presented difficulties because of defendant's unique and highly

specialized work expertise. In addition, the case involved numerous different financial accounts and assets, which were complicated by the parties' disputes concerning valuation and the effect of expenditures, earnings, and investments between the time of separation and trial. The parties also contested a number of matters not at issue on appeal, such as transportation for parenting time and the location of various items of personal property. Thus, we find no clear error in the trial court's characterization of the case.

Defendant finally argues that the trial court inappropriately based its award of attorney fees on the additional finding that "[a] simple review of the file makes it abundantly clear that the plaintiff incurred substantial fees and costs because of the defendant's failure to cooperate with the plaintiff's discovery requests." On appeal, the parties dispute the propriety of various minutia, but we ultimately regard this as well within the experienced trial judge's superior position to evaluate, having actually been through the case with the parties. Although it is clear that the trial court found some fault with the way both parties conducted their sides of the matter, we simply do not find clear error in the trial court's finding that defendant failed to be as cooperative as he should have been, and we do not find an abuse of discretion in the trial court's ultimate attorney fee award.

Therefore, we reverse the portion of the trial court's judgment imputing income to defendant on the basis of possible private employment in Michigan or his Air Force Reserves experience, and in all other respects we affirm. Because the imputation of income affects other aspects of the trial court's judgment, we remand for further proceedings as the trial court deems necessary and appropriate. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Kurtis T. Wilder
/s/ Alton T. Davis