STATE OF MICHIGAN

COURT OF APPEALS

PATRICK B. WELSH,

Plaintiff/Counter-Defendant-Appellee,

v

CHRISTINE VIOLA WELSH,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
June 22, 2010

No. 288928
Emmet Circuit Court
LC No. 08-001177-DO

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant Christine Welsh appeals as of right a divorce judgment issued following a bench trial. Prior to trial, Christine and Patrick Welsh reached an agreement on all issues except spousal support. As part of their agreement, they stipulated to a division of the marital property, with each receiving approximately $207,000 in assets.[1] On appeal, defendant challenges numerous factual findings of the trial court, and argues that the trial court's award of spousal support of $1000 a month for 3 years, when she requested permanent spousal support of $3000 a month, was unfair and inequitable. We agree and remand for additional proceedings consistent with this opinion.

[1] Under the terms of the agreement, plaintiff was to receive the following: a 2002 Jeep (value unspecified); the marital home (valued at $219,500); Patrick's business, Country Garden & Landscape (valued at $51,000); plaintiff's IRA (valued at $30,000); plaintiff's life insurance with Genworth Annuity and Farm Bureau; plaintiff's CD (valued at roughly $11,000); and plaintiff's cash accounts (valued at roughly $12,000). Defendant was to receive the following: a 2003 Pontiac (value unspecified); defendant's 401(k) (valued at $18,000); defendant's IRA (valued at $5,600); defendant's life insurance with Farm Bureau; defendant's CD (valued at roughly $11,000); defendant's cash accounts (valued at roughly $51,000); and a cash payment from plaintiff for $119,000 to equalize the property settlement.

"We review a trial court's decision to award spousal support for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). A trial court's factual findings regarding spousal support are reviewed for clear error and are presumptively correct. *Id.* The appellant has the burden of showing clear error. *Id*. If this Court determines that the trial court's findings are not clearly erroneous, this Court must then determine whether the trial court's decision was fair and equitable in light of the facts. *Id.* at 433. The trial court's award of spousal support must be affirmed unless this Court is firmly convinced that the award was inequitable. *Id.*

"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." *Woodington v Shokoohi*, ___ Mich App ___; ___ NW2d ___ (Docket No. 288923, issued May 4, 2010), slip op p 2. In determining whether to award spousal support, a trial court should consider the following factors:

> (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' age; (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*.]

Additionally, "'[w]here both parties are awarded substantial assets, the court, in evaluating a claim for [spousal support], should focus on the income-earning potential of these assets and should not evaluate a party's ability to provide self-support by including in the amount available for support the value of the assets themselves.'" *Gates*, 256 Mich App at 436, quoting *Hanaway v Hanaway*, 208 Mich App 278, 296; 527 NW2d 792 (1995).[2]

In this case, both plaintiff and defendant received $207,000 in marital assets. In considering plaintiff's ability to pay alimony, the trial court took into account plaintiff's duty to repay a loan that he had acquired to pay defendant for her share of the couple's real property, i.e.

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[2] Plaintiff attempts to argue that *Hanaway* in distinguishable because it involved wealthy parties. There is nothing in the opinion that limits its application to only wealthy litigants and such a proposition is not consistent with the very premise of our judicial system. Furthermore, *Hanaway* has been applied to cases where the party paying alimony made only $45,000 and where the martial assets awarded were only $57,000. See *Klesczewski v Klesczewski*, unpublished opinion per curiam of the Court of Appeals, issued August 22, 2000 (Docket No. 213288); *Kaylor v Kaylor*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 1998 (Docket No. 204722). In any event, the evidence shows that each party received $207,000 in assets. We believe that this is sufficient to constitute "substantial" assets.

their house, outbuilding, and approximately 10 acres of land. The trial court noted in its opinion that defendant was going to "be saddled with debt to pay the settlement." This was error.

That plaintiff had to take out a loan to pay defendant $119,000 of her award is of no moment and the trial court should not have considered this. Plaintiff does not have less than $207,000 in assets because of the loan. Rather, he had to make the payment because he had *more* than $207,000 in assets—theoretically he had $326,000, thus necessitating the payment. With plaintiff's loan, each of the parties would net $207,000 in assets.[3] Accordingly, it was inappropriate to consider plaintiff's required repayment of the loan when determining either his ability to pay or the amount he should pay. Plaintiff elected to take out a loan rather than sell assets. That was certainly his option, but defendant's spousal support calculation may not be reduced based on this decision.[4] See *Vanalstine v Vanalstine*, unpublished opinion per curiam of the Court of Appeals, issued September 22, 2005 (Docket No. 254655) (Concluding that the trial court properly ignored that the defendant would have to mortgage his property to pay his share of the property settlement when determining the defendant's ability to pay spousal support because the "defendant is not acquiring any existing debt, as he is allowed to choose whether to liquidate or mortgage the property to plaintiff for her share of its worth").

Moreover, plaintiff's assets are income-producing assets because he received the business. Defendant received cash that, although liquid, earns very little income. Accordingly, although the parties received equal assets, plaintiff received the majority of the income-producing assets.

The evidence also indicates that plaintiff's income substantially exceeds defendant's. The trial court found that the 54-year-old defendant earns $10 per hour as a part-time receptionist and that her take home pay was $330 biweekly or $8,580 per year based on the available 15 to 22 hours of work per week. The trial court concluded that her monthly net income for full-time work would be roughly $1,168, which would be just over $14,000 per year. Although we do not find this conclusion erroneous, the trial court did err in its calculation of plaintiff's income by double crediting capital improvements to the business against that income. The trial court gave plaintiff a double credit for reinvestments into his business. Plaintiff's CPA testified that over the last six years plaintiff had put on average $22,000 per year back into the business in capital improvements, although she anticipated that this amount would be less in the future because much of the work was done.

While we do not take issue with the trial court's deduction of the capital improvement expenses from plaintiff's annual income, the trial court based that annual income on the CPA's

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[3] That is to say, plaintiff still has $326,000 in assets, but has a loan of $119,000, to render his net assets $207,000.

[4] We also note that, although the trial court concluded that plaintiff did not have the ability to pay more spousal support, the conclusion was reached without any evidence as to the plaintiff's living expenses. Accordingly, on remand, the trial court shall make its determination of plaintiff's ability to pay based solely on evidence.

calculations, which set forth plaintiff's "net income after taxes and depreciation." The CPA testified that depreciation is a representation of capital improvements for purposes of taxes, which require the expenses to be spread out over a certain number of years. Plaintiff was not entitled to be credited twice for the same expenses. Thus, giving him credit for the full amounts of the annual capital improvement costs while also giving him credit for depreciation listed on his taxes was clearly erroneous. The capital improvement expenses should have been subtracted from the "net income after taxes and before depreciation." By doing so, defendant's net income in 2003, 2004, 2005, 2006 and 2007 after taxes and capital improvements was $59,181, $55,050, $63,018, $34,137,[5] and $74,924 respectively for an average of about $57,500.[6] As noted above, we agree with the trial court's finding as to defendant's current full-time earning potential. As a result, the record evidence indicates that plaintiff's yearly net income is nearly seven times that of defendant's present net income and just over four times that of her potential full-time net income.

Lastly, although the trial court properly declined to accept some of the amounts in defendant's proffered budget, it erred in dismissing some categories completely rather than limiting the amounts. The purpose of spousal support is to make certain that the parties live as close to their previous standard of living as possible without impoverishing either party. *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996). The factors that the trial court is to consider are designed to provide a complete picture of each parties assets, income, expenses, and earning ability, as well as a sense of the parties prior standard of living. Here, where the trial court had no information on plaintiff's monthly expenses, it failed to consider any of defendant's living expenses, it failed to consider that plaintiff received the income-producing assets, and it improperly considered plaintiff's loan to pay the property settlement, we do not believe the trial court rendered a fair and equitable decision. *Gates*, 256 Mich App at 436.

Under these circumstances, we conclude that it was error for the trial court not to order a greater amount of support and for a longer period. This was a 35-year marriage. Defendant is 54 years old and is without higher education, with her only real work experience being unskilled office work and keeping simple ledgers for a small family business. We find no basis in the record for the court's conclusion that a three-year period is sufficient for plaintiff to "learn new skills and/or secure better employment."[7] Given that each party received substantial assets and

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[5] This relatively low year reflected a $33,377 improvement to the outbuilding on the couple's property, which was to be used as an office for the building.

[6] This, of course, assumes that defendant does not obtain future income as a result of these capital expenditures and treats them as total losses.

[7] The court found that defendant had previously worked full-time for Independence Village at the same job she is presently performing on a part-time basis for $10 per hour, that she had performed some manual labor in the family landscaping business, that she had done housecleaning for others at some point, and that she ran the office and kept the books for the couple's landscaping business. The court noted that plaintiff has "some limited computer skills." Defendant testified that when her children were young she volunteered at the schools and had a paid position at the school for about a year. After that, she occasionally cleaned homes, briefly

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that plaintiff received the income-earning assets (the business), as well as having a far greater earning potential over defendant, defendant should not be expected to consume her capital to support herself. See *Hanaway*, 208 Mich at 295-296.

We remand for a determination of an increased amount and duration of spousal support. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Pat M. Donofrio

(…continued)

provided daycare services to one little boy, worked for an agency that provided some homemaker services through a local agency and worked for Independence Village. Defendant described her bookkeeping duties for the landscaping business as "entering checks into a book." Plaintiff presented testimony from a CPA who did his taxes and who he had hired to do the landscaping company books after he and his wife separated. She testified that the bookkeeping duties at the company involved "paying . . . bills and doing . . . payroll" and that she had not examined defendant's work because defendant used a "manual system" and started fresh each year. Plaintiff testified that defendant would organize the expenses in a ledger but that he would calculate the figures and determine the amount of receipts, expenses and income. More generally, he stated that in regards to bookkeeping, "I would do some of it, and Christine, I would say, though, she had a lot to do with it." We do not believe that any of this evidence provides a basis to conclude that, after three years, a 55-year-old woman will have obtained higher paying employment than she is now capable of obtaining.