

STATE OF MICHIGAN
COURT OF APPEALS

PATRICK B. WELSH,

Plaintiff/Counterdefendant-
Appellee,

v

CHRISTINE VIOLA WELSH,

Defendant/Counterplaintiff-
Appellant.

UNPUBLISHED

June 22, 2010

No. 288928

Emmet Circuit Court

LC No. 08-001177-DO

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

JANSEN, J. (*dissenting*).

I cannot conclude that the trial court clearly erred in any of its factual findings or that the court's award of spousal support to defendant in the amount of \$1,000 a month for three years was clearly inequitable. Therefore, I respectfully dissent.

A trial court's main objective in awarding spousal support is to balance the incomes and needs of the parties in a manner that will not impoverish either of them. *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336 (2008). "[S]pousal support is to be based on what is just and reasonable under the circumstances of the case." *Id.* at 727. Assuming that the trial court's underlying findings of fact are not clearly erroneous, this Court must determine whether the court's decision concerning spousal support was fair and equitable in light of the facts. *Id.* The trial court's award of spousal support must be affirmed unless this Court is firmly convinced that the award was inequitable. *Id.*

As an initial matter, I cannot agree with defendant's contention that the trial court clearly erred by finding that her income would be \$1,168 a month. Defendant submitted a monthly income/expense form to the trial court, listing her "total monthly income" as \$1,168. Additionally, defendant testified that she believed her earning capacity was between \$1,083 and \$1,166 a month. Lastly, defendant testified that she voluntarily left a full-time position for a part-time position. It is well settled that the trial court may consider a voluntary reduction in income when determining the proper amount of spousal support. *Moore v Moore*, 242 Mich App 652, 655; 619 NW2d 723 (2000). I perceive no clear error in the trial court's determination that defendant's income would be \$1,168 a month.

Nor do I find any clear error in the trial court's determination that defendant's claimed expenses were inflated. Defendant testified that she had calculated her monthly expenses to be about \$4,428. Defendant stated that she reached this figure by reviewing her checkbook register from previous years. But as the trial court noted, defendant included certain unnecessary expenses and overestimated other expenses when preparing this calculation. For example, defendant included a \$300 monthly car payment when calculating her expenses. However, as the court pointed out, defendant was receiving a vehicle as part of the property settlement and therefore would not have a monthly car payment. In sum, I cannot say that the trial court clearly erred by finding that defendant had overstated her expenses in this case.

I further conclude that the trial court did not err in its determination that plaintiff lacked the ability to pay spousal support in the amount of \$3,000 a month. The court carefully considered the evidence, including the testimony of plaintiff's accountant, and found that plaintiff's annual income was approximately \$71,426. Contrary to defendant's assertions, there is no indication that the trial court failed to consider the money plaintiff used for capital expenditures in calculating plaintiff's income. Moreover, as the trial court properly determined, plaintiff was required to service a loan in the amount of \$119,000. The trial court's factual findings are presumed correct, and the appellant has the burden of showing clear error. *Beason v Beason*, 435 Mich 791, 804-805; 460 NW2d 207 (1990). Moreover, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). This Court may not "substitute its judgment for that of the trial court; if the trial court's view of the evidence is plausible, the reviewing court may not reverse." *Beason*, 435 Mich at 805. As noted earlier, it is fundamental that an award of alimony should not impoverish either party. *Berger*, 277 Mich App at 726. After reviewing the evidence presented in this case, I simply cannot conclude that the trial court clearly erred in its determination that plaintiff could not afford to pay defendant spousal support in the amount of \$3,000 a month.

The record belies defendant's argument that the trial court failed to take into account that the parties had been married for 35 years. Indeed, the trial court's written opinion stated that "[t]he parties . . . were married for 35 years" and that "[t]he long-term nature of this marriage supports [defendant's] request for spousal support." Contrary to defendant's assertion, not only did the trial court take into account the length of the marriage, but it also found that the length of the marriage supported her claim for spousal support. I find no error in this regard.

The record also belies defendant's assertion that the trial court failed to take into account that the parties' marriage was "traditional" and that defendant had earned substantially less money than plaintiff. I acknowledge that the trial court did not mention that this was a "traditional" marriage in its written opinion. However, MCR 2.517(A)(2) does not require the trial court to recite all the evidence considered. Indeed, the trial court's failure to mention a particular fact does not necessarily imply that it was ignored. See *Fletcher v Fletcher*, 447 Mich 871, 883-884; 526 NW2d 889 (1994). Given the trial court's lengthy recitation of plaintiff's and defendant's work and income history, it is clear that the trial court was aware that defendant's earning capacity was less than plaintiff's. I perceive no clear error on this issue.

Lastly, I cannot conclude that the trial court failed to consider defendant's \$119,000 cash payment from plaintiff in making its determination concerning spousal support. Although the court did not place overwhelming weight on this one factor, it is clear to me that the court did

take the \$119,000 payment into account in deciding whether spousal support was appropriate under the facts of this case. Nor can I conclude, contrary to defendant's contention, that a different result was somehow required under the reasoning of *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995). I believe that the facts of *Hanaway* are readily distinguishable from those of the case at bar.

In short, I perceive no clear error in the factual findings challenged by defendant, and I conclude that the trial court's specific award of spousal support was fair and equitable in light of the facts of this case. See *Berger*, 277 Mich App at 727. Because I do not believe that the trial court's award of alimony in the amount of \$1,000 a month for three years was clearly inequitable, I would affirm.

/s/ Kathleen Jansen