

STATE OF MICHIGAN
COURT OF APPEALS

DOUGLAS ERWIN JENSEN,

Plaintiff-Appellant,

v

MICHELLE LYNN JENSEN,

Defendant-Appellee.

UNPUBLISHED

July 8, 2010

No. 289698

Muskegon Circuit Court

LC No. 07-235687-DM

Before: OWENS, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's unequal property distribution and the award of spousal support and attorney fees in this divorce action. We reverse and remand.

Plaintiff and defendant were married approximately 23 years at the time of their divorce and were the parents of three children.¹ Custody and child support were not issues at the time of trial. Both parties were 45 years of age and had no significant health issues. Plaintiff worked for Kellogg² throughout the term of the marriage. His income in 2007 was \$92,777.67. Plaintiff stated that his employer offered unlimited overtime and for the previous four or five years, he worked between 65 and 70 hours a week, seven days a week to take advantage of this opportunity. Defendant was employed part-time with Spectrum Health as a high-risk obstetrics registered nurse. Despite the availability of full-time work, defendant did not seek additional work hours in order to permit her to be involved in the children's school and activities.³ Defendant indicated she averaged 30 hours of work a week, including overtime, resulting in her earning \$51,690.50 in 2007. Plaintiff admitted to infidelity, comprised of a one-night encounter

¹ When the divorce proceedings were initiated, one of the children had already attained the age of majority. At the time of this appeal, a second child has also obtained the age of 18 and is no longer eligible for child support. The parties' youngest child will be 18 years of age on December 1, 2011, and is anticipated to graduate from high school in 2012.

² Plaintiff initially worked for Keebler, which was purchased by Kellogg.

³ For defendant to be considered full-time by her employer, she need work only three 12-hour shifts, or 36 hours, a week.

during the marriage, which defendant was not aware of until after divorce proceedings were initiated. Plaintiff also acknowledged a friendship with another woman that he communicated with by telephone and spent time with, but denied any sexual relationship occurred until after divorce proceedings were filed. Defendant did not present any evidence at trial to contradict this assertion.

Reviewing the factors delineated in *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992), the trial court observed that defendant “is claiming that the breakdown in the marriage relationship was the fault of the plaintiff/husband.” It also noted defendant’s complaint that plaintiff “worked more hours than he had to in order to provide for the family” and did not spend the majority of his free time with the family but rather pursued various recreational interests. The trial court found that “defendant offered convincing proof that the plaintiff had been unfaithful to her during the marriage,” but rejected plaintiff’s assertions regarding defendant’s infidelity. With respect to the parties’ respective earning abilities, the trial court reviewed their most recent annual wages noting that defendant “is capable of earning more if a full-time position becomes available” and that plaintiff “works a lot of over-time, some of which is mandatory.” Based on its review of the various factors, the trial court found “that equity dictates that the assets be divided on a 55%-45% basis in favor of the defendant.”

In distributing the parties’ assets, the trial court awarded defendant the marital home, subject to her payment of the outstanding equity line of credit of approximately \$6,000, her vehicle and the household furnishings.⁴ Plaintiff was awarded a cabin valued at \$42,000, two automobiles and various recreational vehicles. In constructing this division, the trial court determined that plaintiff was entitled to a credit of \$66,500 to equalize the value of the assets distributed in accordance with the ratio of 45:55, comprised of: (a) defendant’s share of plaintiff’s defined contribution plan (401k), (b) “\$2500 for attorney fees owed by the plaintiff to the defendant, and (c) a reduction of \$100 a month in spousal support for 30 months to be paid by plaintiff to defendant. The remaining retirement accounts of the parties were divided in accordance with the percentages used for the real and personal property distribution.

The trial court, using the factors delineated in *Parrish v Parrish*, 138 Mich App 546, 554; 361 NW2d 366 (1984), awarded defendant spousal support for six years at the rate of \$600 a month.⁵ In awarding spousal support, the trial court reiterated defendant’s complaints regarding plaintiff’s infidelity and work hours and noted the discrepancy in income between the parties, finding plaintiff “has the means to pay some spousal support” despite determining that “[b]oth parties are capable of working,” and defendant’s receipt of an increased share of the marital assets and child support. The trial court also stated that defendant “has received no income producing assets” and opined that, while neither party would be capable of maintaining their

⁴ There appears to be no outstanding mortgage on the marital home, making the net value of the residence \$214,000, which was awarded to defendant as her sole property.

⁵ The first 30 months of spousal support was reduced by \$100 a month to equalize the value of the property settlement.

current standard of living, the impact on defendant would be greater “due to her lower income.” A judgment of divorce memorializing this ruling was entered on September 4, 2008.

Plaintiff petitioned the trial court to amend the judgment of divorce regarding the award of spousal support, attorney fees and the division of real property, along with other miscellaneous requests not relevant to this appeal. The trial court denied plaintiff’s request, finding the award of spousal support “modest” and identifying as the relevant factors in its decision to be the long-term nature of the marriage and the discrepancies in income between the parties. The trial court indicated that while fault was a consideration, it was “not an overriding one.” Denying plaintiff’s request to modify the property division, the trial court indicated its belief “that the plaintiff was the primary cause of the breakdown of the marriage and did consider that as one factor in making the property division as it did.” The trial court further found the “parties [sic] disparity in income” to be “a sufficient basis to justify the award” of attorney fees.

“This Court reviews a property distribution in a divorce case by first reviewing the trial court’s factual findings for clear error, and then determining whether the dispositional ruling was fair and equitable in light of the facts.” *Olson v Olson*, 256 Mich App 619, 622; 671 NW2d 64 (2003). In reviewing an award of spousal support:

The trial court’s factual findings are reviewed for clear error. The findings are presumptively correct, and the burden is on the appellant to show clear error. A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been made. If the trial court’s findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts. The trial court’s decision regarding alimony must be affirmed unless the appellate court is firmly convinced that it was inequitable. [*Id.* at 629-630 (internal citations omitted).]

We review a trial court’s ruling on an award of attorney fees for an abuse of discretion. *Id.* at 634.

On appeal, plaintiff challenges the trial court’s determination in awarding spousal support. Plaintiff asserts the trial court’s factual determination in the attribution of fault based on infidelity and excessive work hours constituted “clear error.” Plaintiff further alleges that the award of spousal support was inequitable, particularly given the unequal division of marital assets and the failure to impute to defendant her “unexercised earning potential,” while effectively mandating him to continue to work overtime to retain his earning capacity.

While an award of spousal support is within a trial court’s discretion:

The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party, and alimony is to be based on what is just and reasonable under the circumstances of the case. 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 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 631 (citations omitted).]

In awarding spousal support, the trial court indicated it based its determination of the length of the marriage and the disparity in the parties' respective incomes. At trial, defendant acknowledged that full-time work was available, but that she elected not to pursue extended hours in order to maintain a schedule she felt to be more compatible with her children's needs. While fault was considered, the trial court indicated it was not a significant factor.

One of the factors to be considered in awarding spousal support is the "abilities of the parties to work." While the trial court was sympathetic to the reduced standard of living necessitated by the parties' divorce and its disparate impact on defendant, this negative effect was in large part attributable to defendant's voluntary election not to seek additional employment despite its availability. Similarly, the significant disparity in the parties' incomes was sustained by defendant's election to maintain reduced work hours, negatively impacting her earnings. It is well recognized that "[t]he voluntary reduction of income may be considered in determining the proper amount of alimony. If a court finds that a party has voluntarily reduced the party's income, the court may impute additional income in order to arrive at an appropriate alimony award." *Moore v Moore*, 242 Mich App 652, 655; 619 NW2d 723 (2000) (citation omitted) (citation omitted). In the circumstances of this case, the trial court should have considered defendant's unexercised ability to earn in any award of support. Defendant's election to continue to work a reduced schedule merely demonstrates her lack of desire to change her circumstances, not the inability to do so. Given the expectation that plaintiff will continue to work extended overtime to sustain, to the extent possible, the lifestyle enjoyed by the parties, it would be inequitable to not require defendant to expend a similar wage earning effort. Further, the trial court erred when it indicated that defendant "has received no income producing assets" when considering the source and amount of property awarded to the parties in calculating support. Contrary to this statement, the defendant did receive, in addition to significant items of real and personal property, 55 percent of three retirement accounts. As such, we remand the issue of spousal support to the trial court for review and recalculation based on defendant's ability to earn.

Plaintiff also challenges the trial court's distribution of real and personal property as inequitable and based on erroneous factual determinations. Factors deemed relevant in the determination of an equitable distribution of property, include, but are not necessarily restricted to:

(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. . . . The determination of relevant factors will vary depending on the facts and circumstances of the case. [*McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996) (citations omitted).]

“The trial court is given broad discretion in fashioning its rulings and there can be no strict mathematical formulations.” *Id.* at 88. However, “while the division need not be equal, it must be equitable.” *Id.* To be considered equitable, a distribution of marital assets should be fairly equivalent. The trial court should explain any significant departure from such equivalence and provide supporting rationale for the distribution. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

In this instance, the trial court’s skewed award of marital assets is inequitable based on the failure to consider defendant’s unearned income potential. As with the award of spousal support, the parties’ respective earning abilities are to be considered in the distribution of property and comprised a factor recited by the trial court in justification for the award of assets. Thus, the trial court’s failure to account for defendant’s voluntary reduction in her income resulted in an inequitable distribution.

We further note that although a finding of extreme fault provides justification for an unequal division of assets, *Sands v Sands*, 442 Mich 30, 31-37; 497 NW2d 493 (1993), a trial court should not give disproportionate weight to a party’s fault. *McDougal*, 451 Mich at 89; *Sparks*, 440 Mich at 162-163. As discussed previously by our Supreme Court, “[m]arital misconduct is only one factor among many and should not be dispositive.” *Id.* at 163. Further, the goal of a trial court is to achieve equity, not to punish the individual found to be at fault, *Sands*, 442 Mich at 36, as a determination of fault does not comprise “a punitive basis for an inequitable division.” *McDougal*, 451 Mich at 90. Hence, the trial court’s indication that plaintiff’s “fault” in the breakdown of the marriage relationship, when viewed in conjunction with the failure to consider defendant’s income earning potential and the erroneous statement that she failed to receive any income producing assets, does not justify the inequitable distribution of the marital property, necessitating remand to the trial court.

We find similar problems with the trial court’s award of attorney fees to defendant. “A party in a domestic relations matter who is unable to bear the expense of attorney fees may recover reasonable attorney fees if the other party is able to pay.” *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 424 (1999); MCR 3.206(C); MCL 552.13. “A party may not be required to invade her assets to satisfy attorney fees when she is relying in the same assets for her support.” *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). Clearly, the trial court determined defendant’s entitlement to attorney fees based on the parties’ “disparity in income.” However, defendant failed to demonstrate that she was unable to bear the expense of paying her own attorney fees given her election to retain a part-time work schedule and thereby voluntarily reducing her income. Further, the trial court appears to have confused the basis for awarding attorney fees by improperly intermingling it with the award of marital assets for purposes of “equalization.”

Finally, we note the existence of a computational error that occurred in the trial court’s original opinion and has carried through into the judgment of divorce and subsequent orders. Specifically, the trial court’s computation of the value of property awarded to plaintiff indicates a sum of \$64,700. The correct amount should be \$74,700. This error in addition has also compromised the total value of marital assets, which should be \$298,000 rather than the \$288,000 indicated. Consequently, the trial court’s computation using the applied ratios is in error, which also serves to impact the equalization figures.

Reversed and remanded to the trial court for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Michael J. Talbot