

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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FRANCIS JOSEPH HINSBERG,

Plaintiff/Counter-Defendant-  
Appellee,

v

MARIA HINSBERG,

Defendant/Counter-Plaintiff-  
Appellant.

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UNPUBLISHED

August 19, 2010

No. 290481

Genesee Circuit Court

LC No. 07-275950-DM

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant appeals as of right the Judgment of Divorce. We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

Plaintiff and defendant were married on July 26, 1986, when they were each in their early to mid-20's. The parties have six children, five of whom were minors when this action commenced. Defendant suffers from epilepsy, for which she takes three separate medications and which prevents her from driving; plaintiff was aware of defendant's epilepsy and the resulting limitations before the parties were married. Early in the parties' marriage, defendant experienced more frequent seizures – one or more per week. However, with medication, this improved over time. At trial, defendant testified that she had grand mal seizures approximately every three months; she also has petit mal seizures. Defendant was working as a licensed practical nurse at the time the parties married. However, she stopped working shortly thereafter, due to her epilepsy and due to the parties' mutual desire that she stay at home with the children. Early in the parties' marriage, plaintiff worked a number of lower-paying jobs, including as a cashier, as a produce clerk, as a telemarketer, as an accountant and in customer service, until the parties decided that he would attend medical school. Plaintiff began medical school in 1994. He graduated from Michigan State's College of Osteopathic Medicine in 1999, and completed his residency in 2002.

Plaintiff filed his complaint for divorce on June 25, 2007; defendant filed her counter-complaint for divorce, and then an amended counter-complaint for divorce, shortly thereafter. The case proceeded to a bench trial and, following nine days of testimony, the trial court issued a written opinion awarding the parties joint physical and legal custody of the minor children and providing for child support accordingly (approximately \$2,000 per month at the time of entry of

the judgment), awarding defendant spousal support in the amount of \$2,000 per month, to be reviewable after three years, dividing the parties' marital assets and debt, and awarding defendant \$5,500 in attorney fees. The January 30, 2009 Judgment of Divorce effectuates these rulings. On appeal, defendant takes issue with the trial court's determinations regarding spousal support, division of marital property and attorney fees; she does not appeal any issue related to custody, parenting time or child support.

### Spousal Support

Defendant first argues that the trial court's spousal support award was based on erroneous factual findings and, consequently, is inequitable. We disagree.

Whether to award spousal support is discretionary with the trial court and this Court reviews that determination for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003); *Korth v Korth*, 256 Mich App 286, 288; 662 NW2d 111 (2003). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). This Court reviews the trial court's findings of fact concerning spousal support for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); *Thornton v Thornton*, 277 Mich App 453, 458; 746 NW2d 627 (2008). A finding is clearly erroneous if this Court, on all the evidence, is left with a definite and firm conviction that a mistake was made. *Beason*, 435 Mich at 804-805; *Smith v Smith*, 278 Mich App 198, 204; 748 NW2d 258 (2008). Special deference is given to the trial court's findings of fact when they are based on the credibility of the witnesses. *Johnson v Johnson*, 276 Mich App 1, 11; 739 NW2d 877 (2007); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). 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. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992); *Thornton*, 277 Mich App at 458-459. The trial court's decision as to spousal support must be affirmed unless this Court is firmly convinced that it was inequitable. *Sparks*, 440 Mich at 152; *Berger v Berger*, 277 Mich App 700, 727; 747 NW2d 336 (2008); *Gates*, 256 Mich App at 433.

The objective of an award of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party; consequently, the amount of spousal support awarded is to be based on what is just and reasonable under the circumstances of the case. *Berger*, 277 Mich App at 726; *Gates*, 256 Mich App at 436. Among the factors the trial court should consider in determining whether to award spousal support are: (1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the ability of the parties to work; (4) the source and amount of property awarded to the parties; (5) the parties' ages; (6) the ability 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. *Berger*, 277 Mich App at 726-727; *Gates*, 256 Mich App at 435-436, quoting *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991).

The record demonstrates that the trial court considered all relevant factors when it determined that defendant was in need of significant spousal support and that plaintiff had the ability to pay such support. Further, we find that the record supports the trial court's findings of

fact, and considering those facts, we find no abuse of discretion in the amount of spousal support awarded.

The trial court determined that plaintiff had the ability to pay spousal support and found his income to be between \$180,000 and \$190,000 annually, consistent with the evidence. Further, the testimony was that plaintiff had the option of working seven days on/seven days off, five days on/five days off or four days on/four days off, along with occasional extra shifts. There was no evidence that plaintiff's schedule was considered less than full-time and, although plaintiff acknowledged that he tried to keep his extra shifts to a minimum in order to spend time with his children, there was no evidence that plaintiff had a significant number of extra shifts available to him. The trial court noted that the parties' financial difficulties, which persisted throughout the marriage, were the result of poor financial management and decision-making. The court also noted defendant's limited earning capacity, her epilepsy and her need for medical care. Having assigned payment of virtually all of the marital debt to plaintiff, the trial court awarded defendant \$2,000 per month in spousal support.

Defendant asserts that this award is inequitable. She takes issue with the trial court's determination that the breakdown of the marriage was the result of a long-term failure to communicate and that this was more prominent than plaintiff's relationship with a female friend, Theresa Allen, of which the trial court was "suspicious." However, both parties testified to a lack of communication in the relationship, and there was testimony that plaintiff's relationship with Allen did not become romantic until after the parties separated. Defendant also argues that the trial court did not appropriately weigh plaintiff's control over the family's finances and the effect of his poor financial decisions on the state of those finances. The trial court was presented with testimony that the accrual of marital debt, including the refinancing of the marital home, was not undertaken as part of some plan by defendant to devalue the marital estate in advance of the divorce, but rather, was occurred as a result of the parties' inability to live within their means over many years. Therefore, the trial court's determination that the parties' financial condition was the result of poor money management, and not of some nefarious strategy to impoverish plaintiff, was supported by testimony about the course of the parties' marriage. It was the trial court's "responsibility to determine the credibility and weight of trial testimony," and this Court recognizes, and defers to the trial judge's "unique opportunity to observe the witnesses" appearing before him. *Johnson*, 276 Mich App at 10-11; *Zeeland Farm Serv's, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

We acknowledge that defendant set forth facts that would have permitted the trial court, in its discretion, to render a larger spousal support award. However, noting again that the amount of spousal support awarded is to be based on what is just and reasonable under the circumstances of the case, *Berger*, 277 Mich App at 726; *Gates*, 256 Mich App at 436, we cannot conclude that the amount awarded was inequitable under the circumstances presented here. Assuming a salary of \$185,000, plaintiff has gross income of just more than \$15,000 per month, while defendant has imputed gross income of approximately \$680 per month. Certainly, that discrepancy is vast, and it seemingly warrants a substantial support award. Further, the trial court's award of \$2,000 per month, together with child support of approximately \$2,000 per

month, provides defendant with approximately \$4680 per month and leaves plaintiff with \$10,986. Thus, the amount awarded, even considering child support, leaves plaintiff with more than twice the gross monthly income of defendant.<sup>1</sup> However, considering the amount of marital debt to be paid by plaintiff, including nearly \$3,000 per month in student loans, we conclude that the spousal support award was “just and reasonable in light of the facts of the case.” *Gates*, 256 Mich App at 436. Defendant testified to expenses exceeding \$10,000 per month, including debt-reduction payments on his student loans. This is not a case where the parties’ assets are substantial. Indeed, as the trial court noted, “the debts are far in excess of the assets.” The trial court attempted to reach an equitable, workable solution to the parties’ dismal financial situation by allocating the debts and determining spousal support in a manner so as to leave defendant without debt, save for the mortgage and home equity obligations on the marital home awarded to her, and with the means, albeit limited, to care for herself and her children when in her care, while still leaving plaintiff with the ability to make required debt-reduction payments and care for himself and the children when in his care. The not-insignificant challenge here was to meet the obligations of both parties without leaving either impoverished. We conclude that this was achieved, in an equitable fashion, by the amount awarded.

It is evident that defendant is in need of permanent spousal support under the circumstances presented. While the Judgment of Divorce is not clear in this regard, plainly it was the intent of the trial court to make a permanent award, with the amount – and not the obligation itself – to be reviewable in three years. The trial court’s apparent concern was that defendant would have greater financial need in three years, when COBRA health insurance coverage was no longer available to her, and, perhaps also, implicitly, that plaintiff would have greater income and less debt – or at least less marital debt – at that time. The trial court thus preserved an opportunity for defendant to have the amount of the award reviewed. Still, considering that the judgment is unclear as to the duration of the spousal support award, we remand to the trial court for entry of an order clarifying that the spousal support award is a permanent award subject to modification beginning after three years in light of whatever changed financial circumstances might occur.

#### Division of marital assets and debts

Defendant next argues that the trial court’s division of marital assets and debt is inequitable and should be set aside. We disagree.

When reviewing the trial court’s property division, this Court must first review the trial court’s findings of fact for clear error. *Sparks*, 440 Mich at 151; *Beason*, 435 Mich at 805; *Berger*, 277 Mich App at 717. A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake was made.

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<sup>1</sup> We observe that this discrepancy will increase over time, as the parties’ minor children reach the age of majority such that plaintiff’s child support obligation decreases, and that while there were five minor children at the time the judgment was entered, as of the date of the issuance of this opinion, there remain only three minor children. Thus, unless it has been reviewed since the Judgment was entered, plaintiff’s current child support obligation has been reduced to \$1,616.

*Beason*, 435 Mich at 805; *Johnson*, 276 Mich App at 10-11. This Court gives special deference to a trial court's findings when based on the credibility of the witnesses. *Id.* at 11; *Draggoo*, 223 Mich App at 415, 429. If the trial court's findings of fact are upheld, this Court must decide whether the dispositive ruling was fair and equitable in light of those facts. The dispositional ruling is discretionary and should be affirmed unless this Court is left with a firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); *Sparks*, 440 Mich at 151-152.

The goal when distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *Berger*, 277 Mich App at 716-717. The division need not be mathematically equal, but any significant departure from congruence must be clearly explained. *Id.* at 717. To reach an equitable division, the trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health and needs, fault or past misconduct, and any other equitable circumstance. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996); *Sparks*, 440 Mich at 158-160; *Berger*, 277 Mich App at 717. The determination of relevant factors will vary with the circumstances of each case and no one factor should be given undue weight. *Sparks*, 440 Mich at 159; *Berger*, 277 Mich App at 717.

Each party was awarded the home in which they were residing, together with accompanying mortgage/home equity obligations. Plaintiff was awarded the parties' timeshare, with its accompanying debt obligation, his Jeep, with its accompanying debt obligation, a 1998 Bonneville (which was purchased by defendant out of inheritance funds she received) "for the benefit of the children, who will help provide transportation to [d]efendant," the ping-pong table, his books and copies of the family pictures, his personal property in his possession, his 403(B) account, the cash value of a life insurance policy, and his share of his defined benefit retirement plan. Defendant was awarded her share of plaintiff's defined benefit retirement plan, and the personal property in her possession. Plaintiff was also given the option of using all of the parties' tax refunds to pay down the parties' \$46,000 consumer debt, or to split it equally with defendant. All other debts, and all other assets, were assigned to plaintiff.

Defendant first argues that the trial court erred by treating the \$46,000 consumer debt as marital debt and not plaintiff's separate debt. Defendant focuses on defendant's initial admission, during his trial testimony, that this was "his debt." However, defendant promptly clarified this testimony, after consulting with his counsel, explaining that the debt resulted primarily from his inability to pay all of the expenses of two households during the pendency of the divorce proceedings. As previously noted, it was the trial court's "responsibility to determine the credibility and weight of trial testimony," and this Court defers to the trial judge's "unique opportunity to observe the witnesses" appearing before it. *Johnson*, 276 Mich App at 10-11; *Zeeland Farm Servs*, 219 Mich App at 195. While some of the expenses incurred by plaintiff may not have been necessary in a strict sense, such as eating at restaurants and purchasing gifts, they were not out of the ordinary relative to the parties' previous lifestyle, nor, with the exception of comparatively insignificant expenditures to purchase gifts for Allen and her children, were they out of the ordinary relative to defendant's conduct during the pendency of the action. Therefore, the trial court did not err by determining that the \$46,000 debt was marital debt.

Defendant next argues that the trial court failed to make specific findings of fact to support its division of marital assets, because it failed to detail its consideration of the pertinent factors in the specific context of its property division and, further, that the award of nearly all of the marital assets to plaintiff was inequitable. Defendant is correct that, having discussed the pertinent factors in the context of spousal support, the trial court's opinion does not detail each consideration again in the immediately-following section regarding the division of the marital property. However, the trial court did indicate that

As a general approach, the [c]ourt looks to equally divide the assets and debts. In this case, given the large income, it is surprising to see that the debts are far in excess of the assets. As such, the [c]ourt must focus on the best way to get out from under the debt. Unfortunately, it will not be possible to provide [d]efendant with assets to help with her maintenance, and this will have to be addressed with spousal support.

The [c]ourt does not believe that [d]efendant is any position to pay off debt. In addition, both parties acknowledge that it was [p]laintiff that controlled the financial decisions that led to their current situation. Finally, the [c]ourt is concerned about [d]efendant's maintenance.

This statement, coupled with the immediate proximity of the discussion of the pertinent factors in the context of the spousal support award, is sufficient to indicate that the trial court considered the pertinent factors when apportioning the marital estate as well as when determining spousal support.

The only assets awarded to plaintiff that defendant sought were the Bonneville, and the cash surrender value of the life insurance policy and the 403(B) account, which were specifically awarded to plaintiff to "assist him in paying down the debts." While it may seem unusual that the Bonneville, which was purchased by defendant for the parties' son, John to use, was awarded to plaintiff, its value is limited (\$2600 at time of purchase) and it was awarded to plaintiff for the benefit of the children, who were directed to assist defendant with transportation, which was the same purpose for which defendant purchased it. Further, considering that defendant lacks a driver's license, and that by awarding the vehicle to plaintiff defendant is relieved of any obligation to insure it, we do not conclude that the trial court's award was inequitable on this basis. And, considering the vast amount of debt allocated to plaintiff, it was not inequitable to award the limited liquid assets to plaintiff for this purpose.<sup>2</sup>

Defendant next argues that it was inequitable for the trial court to order her to pay the home equity line on the marital home. However, considering plaintiff's testimony that the proceeds of the home equity line were used to pay marital expenses before the filing of the

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<sup>2</sup> Defendant asserts that plaintiff was awarded the 2006 and 2007 tax refunds, however, the judgment makes clear that plaintiff had the option of using those marital assets to pay marital debt, or of splitting them with defendant; he had no ability or right to use those funds for his own purposes.

complaint for divorce, and considering the trial court's finding that the refinancing resulting in that debt was undertaken without any nefarious or subversive purpose by plaintiff, the trial court's allocation of responsibility for the home equity line, along with the mortgage, for the marital home to defendant was not inequitable. As noted earlier, a similar obligation was imposed on plaintiff as to debts associated with the home he was awarded.

Finally, defendant argues that the trial court erred by failing to identify defendant's medical degree as a marital asset, for which she was entitled to a "substantial" compensatory award. Defendant is correct that one spouse's attainment of an advanced academic degree during marriage can create a marital asset in which the other spouse holds an equitable claim. *Berger*, 277 Mich App at 718; *Postema v Postema*, 189 Mich App 89, 101; 471 NW2d 912 (1991). As this Court explained in *Postema*:

. . . an award of compensation to a nonstudent spouse is premised upon both general notions of "fairness" and the existence of a "concerted family effort." The relevancy of fairness is that, in Michigan, equitable considerations form the underlying basis for recognizing a claim for compensation involving an advanced degree, and that the ultimate goal in every divorce case is to do what is necessary to accord complete equity under the facts and circumstances of the case.

Second, the concept "concerted family effort" stresses the fact that it is not the existence of an advanced degree itself that gives rise to an equitable claim for compensation, but rather the fact of the degree being the end product of the mutual sacrifice, effort, and contribution of both parties as part of a larger, long-range plan intended to benefit the family as a whole. The concept is premised, in part, on the fact that the attainment of an advanced degree is a prolonged undertaking involving considerable expenditure of time, effort, and money, as well as other sacrifices. Where such an undertaking is pursued as part of a concerted family effort, both spouses expect to be compensated for their respective sacrifices, efforts, and contributions by eventually sharing in the fruits of the degree. Where, however, the parties' relationship ends in divorce, such a sharing is impossible. Although the degree holder will always have the degree to show for the efforts, the nonstudent spouse is left with nothing. Therefore, a remedy consistent with fairness and equity requires that an attempt be made to at least return financially to the nonstudent spouse the value of what that spouse contributed toward attainment of the degree. [*Id.* at 94-96.]

Further,

an award of compensation is premised upon equitable considerations, wherein the goal is to attempt to financially return to the nonstudent spouse what that spouse contributed toward attainment of the degree. Because such an award is not premised upon the notion that a nonstudent spouse possesses an interest in the degree itself, we do not believe the actual value of the degree is a relevant consideration. In this respect, we agree with the following observations made in *Krause* [*v Krause*, 177 Mich App 184, 197-198; 441 NW2d 66 (1989)]:

[W]e believe that defendant is not entitled to any award specifically designed to compensate her for a portion of the ‘value’ of plaintiff’s degree. Rather, we believe that the trial court may consider defendant’s assistance to plaintiff in determining an appropriate award. . . .

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[T]he trial court must keep in mind that it is compensating defendant for her assistance to plaintiff while he pursued his degree. Thus, the so-called ‘value’ of the degree or plaintiff’s potential income to be earned from having the degree is irrelevant to the analysis. The trial court must focus solely on what is necessary to compensate defendant for the burdens on her or the sacrifices made by her so that plaintiff could pursue his degree. [*Postema*, 189 Mich App at 103.]

Consequently,

any valuation of a nonstudent spouse’s equitable claim involving an advanced degree involves a two-step analysis. First, an examination of the sacrifices, efforts, and contributions of the nonstudent spouse toward attainment of the degree. Second, given such sacrifices, efforts, and contributions, a determination of what remedy or means of compensation would most equitably compensate the nonstudent spouse under the facts of the case. . . . the length of the marriage after the degree was obtained, the sources and extent of financial support given to the degree holder during the years in school, and the overall division of the parties’ marital property are all relevant considerations in valuing a nonstudent spouse’s equitable claim involving an advanced degree upon divorce. [*Id.* at 105.]

In the instant case, defendant contributed to the degree by maintaining the home and caring for the children while plaintiff was in school and throughout his intern and residency periods in much the same manner as she had done previously. However, defendant did not contribute financially or by setting aside or delaying her own career aspirations and the parties supported themselves and their children while plaintiff was in school almost exclusively by way of student loans and plaintiff’s limited employment. Testimony further established that there was not any significant change in the parties’ lifestyle during this period of time as compared to previous years. Finally, the responsibility for those student loans, which remained in excess of \$280,000 at the time of trial, were allocated solely to plaintiff. Under these circumstances, we conclude that the trial court’s decision not to provide defendant with a “substantial award” in consideration of plaintiff’s medical degree was not inequitable.

#### Attorney fees

Defendant asserts that the trial court abused its discretion by failing to award her the full amount of trial attorney fees requested. We agree.



This Court reviews a trial court's decision to award attorney fees for an abuse of discretion. *Wright v Wright*, 279 Mich App 291, 306; 761 NW2d 443 (2008); *Gates*, 256 Mich App at 437-438; *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado*, 476 Mich at 388.

Attorney fees are not recoverable as of right in divorce actions; they may be awarded only when a party needs financial assistance to prosecute or defend the suit. *Gates*, 256 Mich App at 438. "It is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Id.* This is particularly true where the other party enjoys a comparatively substantial income advantage over the party seeking attorney's fees. *Id.* Such is certainly the case here. Defendant has no income from which to pay her attorney fee; her only means of paying these fees would be from her spousal support payments, on which she must rely to support herself. As this Court explained in *Kurz v Kurz*, 178 Mich App 284, 297-298; 443 NW2d 782 (1989):

In the instant case, although the trial court did not make an express finding that defendant would be unable to defend the action without an award, such finding is implicit from the court's other rulings. The court found that defendant had limited present means of support and that her health was poor. It also found that plaintiff, in contrast, had the means to pay the attorney fees and costs and that he enjoyed a far greater earning potential. Those findings are well supported by the evidence. And, while we recognize that defendant was awarded alimony and a substantial portion of the marital property, much of the value of those awards appears to be either uncollectible at this time or not subject to ready liquidation. Also, the awards were meant to provide defendant with a means of support. Under the circumstances of this case, she should not be forced to invade those awards in order to pay her attorney fees and costs.

Here, although defendant was awarded spousal support, she was not awarded significant unencumbered marital assets, there being none. Defendant has significant health issues that prevent her from becoming gainfully employed; she is unemployed and has been unemployed for many years as a result of her health issues and of the parties' agreement that she would stay at home with the children, and her earning capacity is limited. Under these circumstances, she should not be forced to invade her spousal support award to pay her attorney fees, especially considering plaintiff's income and earning capacity. *Id.* Rather, "[b]ecause plaintiff enjoyed a comparatively substantial income advantage following the judgment of divorce, . . . the trial court erred by making an award of attorney fees that requires defendant to invade her assets." *Gates*, 256 Mich App at 438-439. Therefore, we remand this matter to the trial court for entry of an order requiring plaintiff to pay \$23,000 in trial attorney fees.

Defendant also asks this Court to award her attorney fees incurred in bringing this appeal. MCR 3.206(C) provides, in relevant part, that:

(1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, and that the other party is able to pay. . .

Defendant asserts that she lacks the financial ability to pay the fees incident to this appeal, while plaintiff has the financial ability to pay those fees. However, the analysis of that argument must take into account our resolution of the other issues raised on appeal. We remand this matter to the trial court for a determination whether an award of appellate attorney fees is appropriate under MCR 3.206 and, if so, the appropriate amount. In so doing, the trial court should consider the impact of this Court's decision on the issues of spousal support and attorney fees for the trial proceedings on each party's ability to pay appellate attorney fees.

We affirm in part, reverse in part and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ William C. Whitbeck