STATE OF MICHIGAN

COURT OF APPEALS

ANNETTE MARIE MILITELLO, Plaintiff-Appellee,	UNPUBLISHED March 20, 2012
v	No. 302257 Bay Circuit Court
MICHAEL PAUL MILITELLO, Defendant-Appellant.	LC No. 10-003214-DO

Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

In this divorce case, defendant Michael Paul Militello appeals by right the trial court's judgment. On appeal, he argues that the trial court erred with regard to its division of cash found to have been in the parties' safe-deposit box, erred when it ordered him to pay spousal support, and erred when it ordered him to pay a portion of plaintiff Annette Marie Militello's attorney fees. We conclude that there were no errors warranting relief. For that reason, we affirm.

I. THE SAFE-DEPOSIT BOX

A. STANDARDS OF REVIEW

We shall first address defendant's argument that the trial court inequitably divided the parties' cash from their safe-deposit box. Specifically, defendant argues that the great weight of the evidence presented at trial established that the safe-deposit box contained $39,500.[1] For that reason, he maintains, the trial court clearly erred when it found that the safe-deposit box had more than $84,000 and further erred when it awarded the $39,500 actually found in the safe-deposit box to plaintiff.

[1] We note that defendant is not entirely clear in making this argument. At one point he states that there was only $39,500 in the safe-deposit box—without clarifying which box—and then at another point he states that there was only three or four thousand dollars in the box.

In deciding a divorce, the trial court must make both findings of fact and dispositional rulings. *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996). This Court reviews the trial court's factual findings for clear error. *Id.*; MCR 2.613(C). The clear error standard is highly deferential. See *Beason v Beason*, 435 Mich 791, 802-805; 460 NW2d 207 (1990) (recognizing that appellate courts defer to a trial court's factual findings and will not reverse if the trial court's account of the evidence is plausible in light of the record evidence); see also *People v McSwain*, 259 Mich App 654, 682-683; 676 NW2d 236 (2003) (discussing the origin and development of the clear error standard). This Court will only conclude that a finding is clearly erroneous when, after reviewing the whole record, we are left with the definite and firm conviction that the trial has made a mistake. *Beason*, 435 Mich at 805. This Court will also uphold the trial court's dispositional rulings unless it is left with the firm conviction that the division was inequitable. *Sparks v Sparks*, 440 Mich 141, 152; 485 NW2d 893 (1992).

B. THE CHEMICAL BANK SAFE-DEPOSIT BOX

1. THE EVIDENCE

At the time that she sued for divorce, plaintiff asked the trial court to enter a restraining order preventing defendant from removing any cash from two safe-deposit boxes that he held in his name at two different banks, Chemical Bank and PNC Bank.[2] The trial court granted the request and signed the restraining order in March 2010. In the order, the trial court provided that the parties could have access to the safe-deposit boxes if opened in each others' presence.

In May 2010, plaintiff moved to have the trial court order defendant to show cause why he should not be found in contempt for violating the March 2010 restraining order. In her motion, she alleged that defendant began to harass her about the safe-deposit boxes after he was served notice of the restraining order on March 31, 2010. After having been harassed during the night and into the next morning, April 1, 2010, she agreed to accompany him to Chemical Bank. They arrived at the bank and removed envelopes that were, according to her, "stuffed, to the point of breaking" with cash. Plaintiff stated that they returned home, but that defendant would not go in to the home because he wanted to get a safe for the cash. She refused to leave him alone with the money and accompanied him on his search for a safe. After she eventually threatened to call the police, defendant agreed to return the funds to Chemical Bank. At the bank, defendant bit plaintiff's hand to loosen her grip on the bag containing the money and then left with the bag. Plaintiff alleged that she did not see the bag again until April 22, when their lawyers retrieved it from defendant's home. At that time, it had only $3,690.00. Finally, she noted that on April 22 their lawyers also opened the safe-deposit box at PNC Bank and that box also had envelopes that were similarly stuffed with cash and the total cash from that box came to $39,500.

[2] PNC Bank is actually the successor bank. However, for ease of reference, we shall refer to it rather than its predecessor.

The trial court held a hearing on this motion in June 2010. Defendant testified that he did not harass plaintiff and never told her that he had $80,000 in his safe-deposit box. Rather, he claimed that he told her that he had a total of $80,000 in assets. Defendant admitted that they retrieved the money from the safe-deposit box at Chemical Bank and that they ultimately returned to the bank to put the money back. He stated that, while waiting for a teller, plaintiff left the bank with the money. He was worried that she was trying to take off with it, so he went after her and tried to grab the bag. He admitted that he panicked, bit her hand, took the bag and hid it at home. Defendant denied that the envelopes were filled with money. He stated that he only took one envelope from the bag before their lawyers counted the money and found that it contained approximately $3,900. He also stated that it normally had between $5,000 and $15,000 in it.

After hearing the testimony, the trial court found that plaintiff was more credible than defendant and found defendant guilty of criminal contempt. It further noted that defendant made it "much more difficult . . . for plaintiff to prove how much" cash was in the safe-deposit box, which was a matter left for trial. It then ordered defendant to pay a fine and attorney fees.

One of the issues at trial involved whether the safe-deposit box from Chemical Bank originally contained more than the $3,900 found in the bag at defendant's home. Plaintiff testified at trial that her husband had become obsessed with "hoarding" money and told her that he had $100,000 in "cash put away." She explained that he had a fear about having money in the bank because "anybody would know about it . . . ." She stated that he was not referring to his total assets when he mentioned the $100,000 in cash. Rather, he repeatedly talked about having put money into safe-deposit boxes: "He always talked about how he was putting money away in a safety-deposit box for our retirement."

Plaintiff testified that, after she sued for divorce, defendant pleaded with her to not include the money from the safe-deposit boxes because the money came from car sales and he could get in trouble because he did not have a license to sell cars. She eventually agreed to go get the money from the safe-deposit box at Chemical Bank because it was her understanding that they would inventory the contents and split the money. She testified that the box was full of money to the point where the envelopes could not be easily removed from the box—"they were getting stuck." They also did not count the money because there "was way too much to count." They then left.

She testified that they drove home and she began to get out, but defendant did not get out. He told her that he wanted to get a safe for the money and she responded that she would go with him. He then drove to various stores to look at safes. After they arrived at their third location, she popped the trunk and took the bag of money. She said defendant immediately ran back to the car and was quite agitated. He then drove them home where he asked for all the money. She told him that she would give him his half and he responded that they would "keep driving" if that were the case. It was only after she threatened to call 911 that he told her that they should just take the money back to the bank.

Plaintiff related that her husband tried to take the bag from her at the bank, but she refused to give it to him. She then sent a text message to her daughter requesting her to come pick her up. After she moved to the bank's parking lot to await her daughter, defendant followed her and tried to wrestle the bag from her. He then bit her and "kept tugging on the bag" until she fell. He told her that she would not get "any of his money" and then got in his car and left.

Plaintiff testified that the bag had far fewer envelopes when their lawyers inventoried it. She stated that there were only "four or five" envelopes during the inventory and that it had in "excess of 20" when they removed them from the safe-deposit box. The total cash found during the inventory was just $3,690. This was in stark contrast to the contents of the second safe-deposit box at PNC Bank, which contained $39,500. Four envelopes from the safe-deposit box at PNC Bank contained $5,000 and two contained $9,500 and $10,000 respectively. The cash was also wrapped with bands that were stamped with dates from 2000 and 2002.

On cross-examination, plaintiff stated that she believed that the safe-deposit box from Chemical Bank had approximately $80,000 in cash. She believed this "because I saw way more envelopes of money than the five he produced." She also noted that he first obtained the safe-deposit box at PNC Bank on March 3, 2010, and that she did not learn of that box until she discovered the keys at their home. She concluded that he must have put the $39,500 in the box on March 3, 2010 because that was the only day that he accessed the box according to the bank's log. Nevertheless, plaintiff agreed that she did not know how much was in the box at Chemical Bank, but had made an educated guess that it was approximately $80,000 from her observations on the day the money went missing and her conversations with defendant on that day. Indeed, she testified that he told her "'I've got $80,000 in there,' and that was the reason why he said he was gonna go to prison and everything else because he said he wasn't supposed to be selling cars."

Defendant testified that the safe-deposit box at Chemical Bank had, at one time, about "10 or 12 thousand." He stated that it was his guess that the box at Chemical Bank had six to eight thousand dollars after he obtained the box at PNC Bank. There were about six or seven envelopes when they removed the cash in April 2010, and there was usually around a thousand dollars per envelope.

2. THE FINDINGS

After the close of proofs, the trial court summarized the testimony and evidence. It also took notice of the transcript from the show cause hearing. The trial court first found that defendant's testimony that there was only a small amount of money in the box was "incredible." The court explained that defendant's actions were inconsistent with there being a nominal sum: "His actions do not in any way, in my opinion, suggest that there was a nominal—relatively nominal sum of money in that [safe-deposit box.]" Indeed, the court characterized defendant's actions as "bizarre" and noted that he had the motive and opportunity, after secreting the money away, to take substantially all the funds. The trial court also accepted plaintiff's testimony that defendant told her that he had $80,000 in the safe-deposit box and that he got her to agree to remove the money by pleading with her. From the testimony and evidence, the trial court found that there was $45,000 in cash in the safe-deposit box at Chemical Bank. It then awarded the

cash that it found to have been in the safe-deposit box from Chemical Bank to defendant and awarded the $39,500 in cash found in the safe-deposit box from PNC Bank to plaintiff.

C. ANALYSIS

On appeal, defendant argues that there was simply no evidence to establish that there was more money in the safe-deposit box at Chemical Bank than what was found in the bag at his home. As such, he maintains, the trial court clearly erred when it "imputed" $45,000 to him. We conclude that there was ample evidence to support the trial court's finding that there was $45,000 in the safe-deposit box.

Defendant's actions on the day at issue were bizarre and ultimately resulted in defendant biting plaintiff and literally fleeing the scene of a crime with the bag of money. And, as the trial court found, defendant's testimony about the amount of money in the bag was inconsistent with his behavior on the day at issue. Indeed, the trial court pointed out the inconsistencies during defendant's examination and concluded that the real reason for his behavior was that the bag had a large sum of money:

> THE COURT: Why would you—Why would you bite her hand and—and basically abscond with the bag over twenty—35 hundred dollars or so in—in—in a bag when you got $39,000.00 in a separate account?
>
> THE WITNESS: Because as I mentioned before, I lost my temper and she had virtually not just the cash in the bag, she had my security ID for work, she had all of my sticks that had all of my work in there, and—
>
> THE COURT: You know, there's another logical explanation, too. Do you know what that is, sir?
>
> THE WITNESS: What's that?
>
> THE COURT: You have a lot more money in that bag than you're willing to admit to.

Given the testimony, the trial court was justified in finding that defendant's testimony about the amount was incredible and in concluding that the actual amount was significantly more than $3,600.

There was evidence concerning the amount that might have been in the safe-deposit box from Chemical Bank. Plaintiff testified that there were more than twenty envelopes in the box and that the envelopes were so stuffed with cash that they got stuck in the box. She testified further that the envelopes were similar to those found in the box at PNC Bank, which was about the same size box. The evidence showed that the box at PNC Bank had $39,500, which was in six envelopes. Of those envelopes, four had $5,000 each, one had $9,500, and the fourth had $10,000. In addition, the trial court accepted plaintiff's testimony that defendant told her on the day at issue that the box actually had around $80,000. Defendant's statement that there was approximately $80,000 in the safe-deposit box at issue is admissible evidence that the box contained that amount. See MRE 801(d)(2).

When the evidence is considered as a whole, the trial court could reasonably find that the safe-deposit box at issue had substantially more money than described by defendant. Further, the trial court could reasonably infer that the envelopes taken from the box at Chemical Bank had amounts similar to those found in the box at PNC Bank—namely, $5,000 to $10,000 each. Had the trial court accepted plaintiff's testimony that there were more than 20 envelopes in the box at issue, it could have plausibly found that there was between $80,000 and $100,000 in that box. But it did not so find. Instead, the trial court found that there was $45,000, which was an amount closer to that found in the box at PNC Bank. And, on this record, we are not left with the definite and firm conviction that the trial court was mistaken as to this finding. *Beason*, 435 Mich at 805. Moreover, given that finding along with the fact that it was plainly defendant's fault that the safe-deposit box could not be properly inventoried, we are not left with the definite conviction that it was inequitable for the trial court to award defendant the missing money and to award plaintiff the cash found in the box at PNC Box. *Sparks*, 440 Mich at 152.

II. SPOUSAL SUPPORT

A. STANDARD OF REVIEW

Defendant next argues that the trial court abused its discretion when it awarded plaintiff spousal support because she did not request support and there was no evidence that she needed the support. This Court reviews a trial court's award of spousal support for an abuse of discretion. *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.* This Court reviews the findings underlying a trial court's decision to award spousal support for clear error. *Id.*

B. ANALYSIS

Trial courts have the authority to award spousal support in order to balance the incomes and needs of the parties in a way that will not impoverish either party. *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336 (2008). In awarding spousal support, the trial court must base the award on what is just and reasonable under a totality of the circumstances. *Id.* In considering whether to award support and the amount that should be ordered, trial courts should generally consider a variety of 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 the 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) the 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. [*Woodington*, 288 Mich App at 356.]

As a preliminary matter, we note that plaintiff addressed spousal support in her trial brief and suggested that the trial court should order defendant to pay more than $1,600 per month in support. It is also clear from the record that plaintiff testified about her current expenses and support and her anticipated support requirements. Accordingly, defendant's claim that plaintiff did not request spousal support is meritless.

In addition, we cannot agree with defendant's contention that plaintiff failed to establish grounds for an award of spousal support. At trial, plaintiff presented evidence that she had relied on defendant's income for most of their thirty-year marriage. She also presented evidence that her earning capacity was approximately one-third defendant's earning capacity. There was evidence too that the parties did not have significant debt—they did not have a mortgage or car payments and did not have significant revolving debt. As such, even after deducting taxes and living expenses, the parties traditionally had significant cash available to fund their lifestyles. The evidence also showed that the parties' children were adults and did not require support.

In determining to award spousal support, the trial court went through the factors outlined above. It found that plaintiff was not earning what she could possibly earn and stated that it was taking that into consideration with regard to the award. Nevertheless, it found that it would be equitable to award plaintiff spousal support. Specifically, it found that defendant's housing expenses would be significantly lower than plaintiffs because it was going to award the marital home to defendant. The trial court determined that, given plaintiff's bare-bones budget, she would need $1300 per month for the first three years. After three years, the award would drop to $1,000 per month, and after six years it would drop to $800 per month. Hence, the trial court provided a reasonable sum for plaintiff's immediate needs, but modified the spousal support to reflect plaintiff's ability to secure additional income in the future. The trial court also provided that the support would be modifiable on the basis of changed circumstances. Finally, the trial court found that defendant had the ability to pay and, because the award would be deductible, it would likely have a "net effect" that was "considerably less than what I've ordered here."

On appeal, defendant does not challenge the trial court's findings. Instead, he argues that the trial court erred in awarding support because the judgment saddled him with non-income producing property and large debt and, as such, the spousal support would impoverish him. However, there was no evidence that the parties had any preexisting debt. And, to the extent that defendant refers to the $99,000 that the trial court ordered him to pay to equalize the division of property, the trial court gave defendant a reasonable period of time—four years—to obtain financing and provided that he should, in the interim, make reasonable payments of $700 per month.

The trial court carefully balanced the parties' needs in light of their income and anticipated expenses. And, taking into consideration the parties' traditional lifestyle and the equities of the case, it provided a reasonable and flexible spousal support award. Accordingly, we cannot conclude that the trial court's decision to award spousal support in the stated amounts fell outside the range of reasonable and principled outcomes. *Woodington*, 288 Mich App at 355.

III. ATTORNEY FEES

A. STANDARD OF REVIEW

Finally, defendant argues that the trial court abused its discretion when it ordered him to pay a portion of plaintiff's attorney fees. Specifically, defendant argues that the trial court could not order him to pay an additional $3,000 of plaintiff's attorney fees because she did not request the fees and she could clearly afford to pay her own attorney fees. This Court reviews a trial court's decision to order one party to a divorce to pay attorney fees on behalf of the other party for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005).

B. ANALYSIS

Trial courts have the discretion to award attorney fees in domestic relations cases. *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007). In a typical divorce, trial courts will award attorney fees on the basis of need—that is, to enable the benefiting party to defend or prosecute the action. *Id.* However, where one party has incurred expenses as a result of the other party's unreasonable conduct, the trial court may order the offending party to compensate the injured party for the expenses incurred as a result of that conduct. *Id.*

Here, the trial court specifically found that plaintiff could afford to pay her lawyer. But it also found that defendant had engaged in unreasonable conduct that warranted an award of attorney fees:

> In this case, the plaintiff has the ability to pay her attorney's fees because she has the inheritance money sitting in bank accounts and the like.
>
> But I find there was some egregious conduct on the part of the defendant in this case and I'm gonna take that into consideration even though she has largely an ability to pay the attorney's fees. I already ordered $1,000.00 in attorney's fees as a result of the contempt proceedings. I'm gonna order an additional $3,000.00 in attorney's fees payable within 60 days . . . [t]hat he will pay her attorney.

In addition to this statement on the record, the trial court explained in the judgment that it was ordering the fees after having "made a finding that his [defendant's] actions as it related to the safe-deposit box was egregious."

In his brief on appeal, defendant argues that the trial court could not award attorney fees because plaintiff did not request them: plaintiff "does not indicate any, want, need, or request for attorney fees." Defendant could not be more wrong when he claims that plaintiff did not ask the trial court to order the payment of attorney fees. Plaintiff not only requested attorney fees in her trial brief, she also testified directly that she wanted the trial court to order defendant to pay a portion of her attorney fees. She explained that she incurred additional expenses as a result of defendant's actions on the day he assaulted her: ". . . he caused the confusion with this money at the bank which required us to do a lot more work of investigation and, you know, trying to put together, you know, some information about what possibly could've been in that—in that box . . . ." She also testified that she had to pay close to $6,000 to her attorney.

Defendant acknowledges that the trial court referred to his "egregious" conduct, but argues—contrary to the authority already noted—that trial courts cannot consider such conduct when considering whether to order the payment of attorney fees: "It is clear that an award of attorney fees in a divorce action is only necessary when a party cannot afford to prosecute or defend the suit based on their (sic) assets." Defendant simply ignores MCR 3.206(C)(2)(b) and those authorities holding that trial courts have the discretion to award attorney fees incurred as a result of unreasonable conduct.

Here, there was clear evidence to support the trial court's finding that defendant not only assaulted his wife, violated a court order, and concealed marital assets, but that his "egregious" actions resulted in additional expense to plaintiff. It is plain from a reading of the trial transcripts that a significant portion of the bench trial had to be dedicated to evidence and testimony concerning the amount of cash that was present in the safe-deposit box at Chemical Bank before defendant fled the bank. The trial court even opined that ninety percent of the trial was the result of the incident at the bank and concluded that there might have been no need for a trial had the incident not occurred: "the whole thing [the trial] would've been eliminated because we'd—everything would be down in black and white on a piece of paper and I could've tried the case, if you couldn't resolve it, in a couple hours." It is also obvious that plaintiff's lawyer had to spend additional time investigating and preparing to present this issue at trial and that this was a direct result of defendant's violation of a court order. Accordingly, the trial court had the authority to order defendant to pay the fees that plaintiff incurred as a result of his unreasonable actions. See *Borowsky*, 273 Mich App at 687; MCR 3.206(C)(2)(b). And, although we would prefer that the trial court had made more detailed findings concerning the expenses that plaintiff incurred as a result of defendant's conduct, see *Reed*, 265 Mich App at 165, defendant has abandoned any claim that the trial court erred in this regard. Defendant noted in passing that plaintiff did not present an itemized statement, but he did not develop that theory and did not cite the record or any legal authority. Indeed, he did not even discuss whether plaintiff could have incurred expenses as a result of his actions. Instead, he focused his arguments on his erroneous understanding that the trial court had no authority to order him to pay plaintiff's attorney fees in the absence of a request for fees and in the absence of evidence that plaintiff could not pay her own lawyer's fees. Accordingly, we conclude that defendant has abandoned any claim that the trial court erred when it found that plaintiff incurred $3,000 in expenses as a result of defendant's unreasonable conduct. See *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 173; 721 NW2d 233 (2006).

There were no errors warranting relief.

Affirmed. As the prevailing party, plaintiff may tax her costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Douglas B. Shapiro