

STATE OF MICHIGAN
COURT OF APPEALS

MARY STUBL,

Plaintiff-Appellee,

v

KEITH STUBL,

Defendant-Appellant.

UNPUBLISHED

July 7, 1998

No. 204363

Macomb Circuit Court

LC No. 95-003230 DM

Before: Sawyer, P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of divorce entered in the Macomb Circuit Court. On appeal, defendant asserts that the trial court erred in ordering him to pay \$400 per week in permanent alimony, \$236 per week in child support and in holding him solely responsible for the entire amount of the 1995 state and federal income tax liability. We affirm.

Our Supreme Court has articulated a two-part standard that applies to divorce cases: The appellate court must first review the trial court's findings of fact under the clearly erroneous standard. If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts. But because we recognize that the dispositional ruling is an exercise of discretion and that appellate courts are often reluctant to reverse such rulings, we hold that the ruling should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable. *Kuntze v Kuntze*, 351 Mich 144; 88 NW2d 608 (1958); *Whittaker v Whittaker*, 343 Mich 267; 72 NW2d 207 (1955). [*Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).]

A finding of fact is clearly erroneous if, after reviewing all the evidence, this Court is firmly convinced that an error has been made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). This Court may not reverse if the trial court's view of the evidence is plausible. *Thames v Thames*, 191 Mich App 299, 302; 477 NW2d 496 (1991).

Defendant first argues that the trial court erred in awarding plaintiff \$400 in permanent alimony. The purpose of alimony is to balance the income and needs of the parties without

impoverishing either party. *Ackerman v Ackerman*, 197 Mich App 300, 302; 495 NW2d 173 (1992). The trial court has discretion to award alimony as it deems “just and reasonable” considering all the circumstances. *Ianitelli v Ianitelli*, 199 Mich App 641, 642-643; 502 NW2d 691 (1993). Several factors are to be considered when making the determination, including:

(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, and (12) general principles of equity. In addition, the court may consider a party’s fault in causing the divorce. [*Id.* at 643; *Thames, supra* at 308 (citation omitted).]

The factors primarily disputed by defendant in the present case focus on the abilities of the parties to work and the abilities of the parties to pay alimony. Defendant contends that the trial court improperly imputed income to him in excess of his salary and failed to impute income to plaintiff based on her unexercised ability to earn. Defendant also contends the award was inequitable. We disagree.

In its opinion, the trial court indicated that defendant had an average weekly net income of \$1,548.84 and that plaintiff had an average weekly net income of \$185.86. We conclude that the trial court did not clearly err in using these figures. First, we reject defendant’s argument that the trial court concluded that defendant had voluntarily terminated his employment with T.A. Systems to avoid paying alimony. The trial court made no findings that defendant had voluntarily terminated his employment and its citation to *Healy v Healy*, 175 Mich App 187, 191; 437 NW2d 355 (1989), was nothing more than a reference to the general rules regarding alimony.

We also reject defendant’s argument that the trial court could not consider income in excess of defendant’s base salary of \$65,000 per year. In addition to the base salary defendant received from Matcon Evergreen Centex (M.E.C.), he also received a monthly commission of 1½ percent on the portion of his sales that exceeded \$50,000. While it is impossible to compute defendant’s actual commissions before the sales are made, his prior work history at T.A. Systems indicates that defendant has performed very well and earned substantial amounts of money in this line of work. Although M.E.C. was a new company and defendant was not its only in-house salesperson, defendant admitted that he had more experience, as well as contacts, than when he began working for T.A. Systems. Further, defendant stated that, unlike when he was working for T.A. Systems, he would be able to sell fixtures in his job with M.E.C. Therefore, we conclude that the trial court did not err in considering an average weekly net income which exceeded defendant’s base salary.

Defendant’s contention that the trial court should have imputed income to plaintiff because she rejected an offer for a clerical job paying \$20,000 per year and took a part-time job with a florist shop earning \$6.50 per hour, working twenty-three to twenty-seven hours per week, is also without merit. We find that the “offer” to which defendant refers is too speculative to be characterized as a legitimate offer of employment and there is no evidence that plaintiff took a lesser-paying job to increase alimony.

Finally, we conclude that the award of \$400 per week in permanent alimony was not inequitable. The record reveals that there is a great disparity in the earning abilities of the parties. During the seventeen-year marriage, defendant was the primary financial supporter and financial manager of the family, while plaintiff remained home to care for the children. Plaintiff, who is in her mid-forties, has not received any schooling beyond high school and has worked very little outside the home. Therefore, the trial court did not abuse its discretion in awarding plaintiff permanent alimony. *Hanaway v Hanaway*, 208 Mich App 278, 295-297; 527 NW2d 792 (1995).

We need not address defendant's claim that the trial court erred in ordering him to pay \$236 per week in child support. As defendant acknowledged during oral argument, that claim is now moot.

Finally, defendant argues that the trial court's decision to hold him solely responsible for the 1995 tax liability was inequitable. We disagree.

The trial court has broad discretion in making a division of property; it is not required to follow a rigid framework or mathematical formula. *Sparks, supra* at 158-159. The division must be equitable, but it need not be equal. *Id.* at 159; *Sands v Sands*, 442 Mich 30, 35; 497 NW2d 493 (1993) (citing *Sparks*). Several factors should be considered when making a division of property. These factors include:

(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. [*Sparks, supra* at 159-160.]

The trial court determined that defendant should be responsible for the 1995 tax debt because he managed the parties' finances in 1995. In its general discussion of property division, the trial court also noted that there was evidence that defendant had engaged in an extramarital relationship and that, although he intended to replenish the funds, he had taken money from his children's accounts.

Defendant first argues that the trial court erred in finding that he had committed adultery prior to the filing of the complaint for divorce. This Court has stated that it is "improper for the trial court to hold divorcing parties to a standard of morality or behavior appropriate for marital partners" and further determined that evidence of an affair, which occurred after the breakdown of the marital relationship and the filing of the complaint for divorce, was not relevant. *Knowles v Knowles*, 185 Mich App 497, 500-501; 462 NW2d 777 (1990). Although there was testimony that defendant did not engage in a sexual relationship with a third party until March 1996, eight months after the complaint for divorce was filed, there was also evidence in the record that the relationship may have begun before the complaint for divorce was filed. Because it is plausible that the relationship could have begun prior to the divorce, it was not erroneous for the trial court to consider this fact. Moreover, this fact was not cited as the specific reason for allocating the entire tax debt to defendant.

Defendant also asserts that the trial court's statement that he took money from the children's accounts was factually inaccurate because he withdrew the money with plaintiff's consent, he intended to repay the money, and his son's life insurance proceeds and MET account should not be characterized as "the children's money." We conclude that this assertion is without merit. It is undisputed that defendant withdrew money from his children's accounts. Moreover, the trial court noted defendant's intention to pay back the money.

Finally, defendant contends that it was inequitable to hold him responsible for the 1995 tax liability where the evidence indicated that the taxes resulted from an \$80,000 settlement he received, the money was used to pay marital debts, and plaintiff failed to sign a joint return. We disagree and conclude that allocating the 1995 tax debt solely to defendant was not inequitable in light of the trial court's finding that defendant committed adultery and because the record demonstrated that defendant handled all the finances but failed to set aside money from the \$80,000 settlement to pay the taxes. Moreover, plaintiff indicated that she refused to sign the joint return because she was concerned about the accuracy of the return. In light of these facts, we cannot conclude that the trial court abused its discretion in holding defendant solely responsible for the 1995 tax liability.

Affirmed.

/s/ David H. Sawyer

/s/ Michael J. Kelly

/s/ Martin M. Doctoroff