

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN M. CZAJKOWSKI,

Plaintiff-Appellant,

v

NORBERT P. CZAJKOWSKI,

Defendant-Appellee.

UNPUBLISHED
September 4, 1998

No. 195960
St. Clair Circuit Court
LC No. 93-001962-DO

Before: Sawyer, P.J., and Bandstra and J. B. Sullivan*, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. Plaintiff challenges the trial court's ruling that neither party was at fault for the breakdown of the marital relationship, its award of spousal support, the distribution of the marital estate, and the refusal to award attorney fees. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff first claims that the trial judge exhibited bias toward plaintiff and should be disqualified from any further proceedings. However, plaintiff failed to file a motion in the trial court requesting disqualification of the trial judge. Thus, this issue has not been preserved for appeal. *Homestead Development Co v Holly Twp*, 178 Mich App 239, 248; 443 NW2d 385 (1989); MCR 2.003(C). Even were this issue preserved, plaintiff has failed to overcome a presumption of impartiality by showing actual and personal prejudice or bias on the part of the trial judge so as to justify disqualification. *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). The trial court's opinion does not demonstrate any favoritism toward defendant or any antagonism toward plaintiff. *Id.* We find that the trial judge's opinion exhibited careful consideration of plaintiff's testimony and did not exhibit any signs of personal or gender bias against plaintiff. We therefore decline to disqualify the trial judge.

Plaintiff next argues that the trial court clearly erred when, after reviewing the testimony of both parties, it ruled that neither party should be attributed a greater percentage of the fault for the breakdown of the marital relationship. Although fault is a legitimate consideration for purposes of alimony and property distribution, *Demman v Demman*, 195 Mich App 109, 110; 489 NW2d 161

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

(1992), we give special deference to factual findings regarding fault when they are based on the credibility of the parties. *Thames v Thames*, 191 Mich App 299, 311; 477 NW2d 496 (1991). Here, the trial court was in the best position to review the conflicting testimony of the parties, and we find no clear error in its determinations. Further, since fault generally should not be attributed to conduct that occurred after the breakdown of the marital relationship, *Knowles v Knowles*, 185 Mich App 497, 500-501; 462 NW2d 777 (1990), the trial court did not err in declining to consider a relationship that apparently commenced after the parties' separation.

Plaintiff also argues that the trial court erred in its disposition of the marital estate. Specifically, plaintiff claims that the trial court failed to protect the equity interest of the marital home when it granted several motions filed by defendant seeking the court's permission to acquire certain loans which encumbered the marital home. Plaintiff also claims that the court erred in deducting several ongoing expenses, primarily property taxes, from the marital estate, severely reducing its value prior to disposition. Finally, plaintiff claims that there was sufficient evidence of fault to justify a sixty/forty distribution of the marital estate in plaintiff's favor and, therefore, that the trial court erred in granting the parties a fifty/fifty distribution. We find no merit in these arguments.

Plaintiff's concerns regarding the deduction of property tax expenses and the encumbrances on the marital home were dealt with in the trial court's valuation of the marital estate. We review the trial court's findings of fact regarding the valuations of particular marital assets under the clearly erroneous standard. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). In its opinion, the trial court recognized that it had promised to protect plaintiff's equity interest in the marital home. The court reviewed contradictory testimony regarding the change in value of the marital estate and conclude that \$127,000 should be added back into the estate. This determination is not clearly erroneous.

Plaintiff's request for a sixty/forty distribution of the marital estate in her favor has not been preserved for appeal. The trial court record reflects that plaintiff specifically requested a fifty/fifty distribution. Moreover, plaintiff's only argument for such a distribution is that defendant was at fault in the breakup of the marriage. As noted above, the trial court properly concluded that there was no fault on the part of either party. Thus, we affirm the trial court's division of property.

Next, plaintiff argues that the trial court's factual findings supporting the alimony award were clearly erroneous, and that the award was unfair and inequitable given the circumstances of this case. The purpose of alimony is to balance the needs and incomes of the parties in such a manner that neither party will be impoverished. *Ackerman v Ackerman*, 197 Mich App 300, 302; 495 NW2d 173 (1992). Generally, such an award should be based upon what is just and reasonable given the circumstances. *Maake v Maake*, 200 Mich App 184, 187; 503 NW2d 664 (1993).

Here, the trial court awarded plaintiff spousal support of \$1,200 per week for eight years. The trial court recognized that there are a number of relevant factors to be considered when making a determination regarding alimony. Those factors, as set forth in *Parrish v Parrish*, 138 Mich App 546; 361 NW2d 366 (1984), 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 of and amount of property awarded to the parties; (5) the age of the parties; (6) the ability of the parties to pay alimony; (7) the present situation of

the parties; (8) the needs of the parties; (9) the health of the parties; (10) the prior standard of living of the parties and whether either is responsible for the support of others; and (11) general principles of equity. *Id.* at 553-554. Plaintiff now challenges the trial court's analysis regarding several of these factors.

First, plaintiff argues that the trial court clearly erred in concluding that she would be able to work in the future. We disagree. In fact, the trial court acknowledged that plaintiff's work prospects were limited by her health problems. While the trial court concluded that plaintiff would be able to perform some work in the future, the court also appeared to acknowledge that plaintiff's future work might not provide income.¹ The trial court's findings on this issue are not clearly erroneous.

The rest of plaintiff's arguments regarding the award of spousal support challenge the trial court's balancing of the *Parrish* factors. Essentially, plaintiff argues that the amount of alimony was not equitable in light of all the facts and circumstances. After a thorough review of the record, we agree. In determining the amount of alimony to award, the trial court essentially focused on plaintiff's reasonable needs. We conclude that the court gave insufficient weight to other factors, such as defendant's ability to pay alimony, the prior standard of living of the parties, and general principles of equity.

The trial court indicated that it often relies on the Washtenaw County Alimony Guideline. However, the court commented that it found the guideline inapplicable in cases involving higher incomes. The guideline formula makes a direct link between income and alimony. Where the payor spouse has all the income, the guideline recommendation for alimony doubles when the payor's income doubles.² Whatever the value of such a guideline,³ the trial court's comment evidences a belief that recipient spouses in high income homes are not entitled to the same percentage of a payor's income as spouses in lower income homes. If alimony were only intended to meet the basic needs of the recipient spouse, the trial court's approach in this case would be eminently logical, because parties' needs do not depend on their wealth. Put differently, spouses in wealthy households do not necessarily have any greater needs than spouses in poor households. However, alimony represents more than provision for the recipient's basic needs. This issue was addressed in the December 1989 Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Courts:

[A]limony should be based upon the amount of money available, not merely on the basic needs of the recipient. There is no justification for limiting one spouse to essential needs while the other enjoys a significantly higher standard of living. Where both have contributed to the whole, each should enjoy equally the benefits of their contributions. [*Id.* at 55.]

Thus, to the extent that a recipient spouse has contributed to the payor's earning potential, he or she is entitled to a share of that potential. This is true even if the recipient's share provides income far beyond the recipient's basic needs.

The logic behind the division of one spouse's earning potential has not always been widely recognized:

[C]ourts do not regularly take into account the career of the wage-earning spouse (the husband in most instances) as the single most valuable asset of the marriage. College degrees, apprenticeship training, skilled trade status, business acumen and career longevity and success are all contributors to the marketability and long term solvency of the husband. If this asset is factored out of the property decision, the wife is often left in a position where she is required to utilize her property distribution as a source of on-going support. The husband, however, can continue to utilize his career for his further advancement and to live on the wages it generates. To the extent that a wife has postponed her own career in order to provide a home and family for her spouse while he develops his career, she is further denied an equitable share of the very asset she has helped create. Women contribute to the overall value of the marital estate as partners in a joint venture. [*Id.* at 56.]

We agree with this reasoning, and we conclude that general principles of equity require recognition of divorcing parties' status as former partners in a "joint venture." See *Hanaway v Hanaway*, 208 Mich App 278, 293-294; 527 NW2d 792 (1995).

In this case, the evidence at trial suggested that, during their first year of marriage, the parties lived on a joint income of approximately \$100,000.⁴ Ten years later, they had an annual income of over \$700,000.⁵ While these numbers do not give a complete picture of the parties' very complex financial situation, they do reflect the fact that defendant's earnings increased dramatically during the marriage. The trial court apparently concluded that defendant's earnings were a result of his own efforts, and, therefore, that plaintiff was not entitled to any credit for those earnings, or for the increase in those earnings over the period of the marriage.⁶ As noted above, marriage is a joint venture, and we believe that it was inequitable to ignore the dramatic increase in defendant's earnings when determining the appropriate amount of alimony. Even if there had not been an increase in defendant's earnings, the trial court's alimony award should have taken into consideration the parties' standard of living during their fourteen years of marriage. Here, it appears that the trial court gave little or no weight to these factors. Under these circumstances, we conclude that the trial court erred, and that the alimony award of \$62,400 per year for eight years was inequitable. Thus, we vacate the award of alimony and remand for reconsideration. On remand, the trial court should consider all of the *Parrish* factors, including the parties standard of living during the marriage, defendant's ability to pay alimony, and general principles of equity.

Finally, plaintiff argues that the trial court erred in failing to award her reasonable attorney fees to cover the cost of her litigation. The trial court awarded plaintiff \$10,000 for attorney fees during the pendency of the litigation. The trial court also used the property division to effectively award plaintiff one-half of the \$50,000 she incurred in accounting fees. Plaintiff apparently incurred attorney fees in excess of \$100,000. A trial court may award attorney fees when it is

necessary to enable a party to carry on or defend the action. MCR 3.206(C)(2); *Maake, supra* at 189. We will not reverse the grant or denial of attorney fees absent a manifest abuse of discretion. *Id.*

Here, although plaintiff was awarded a substantial amount of property, she should not have been required to invade principal to pay attorney fees, given defendant's considerable property and earnings, and given the fact that defendant apparently used marital assets to pay his attorney fees.⁷ See *Hanaway, supra* at 299. Under these circumstances, we believe that attorney fees are appropriately considered living expenses. See *Rapaport v Rapaport*, 158 Mich App 741, 752; 405 NW2d 165 (1987), modified on other grounds 429 Mich 876 (1987). Here, because plaintiff has a limited ability to work, her potential income consists primarily of alimony. Factoring in attorney fees of over \$100,000, the trial court's alimony award of \$62,400 per year for eight years appears to be insufficient to allow plaintiff to meet all of her living expenses. Under these circumstances, the trial court's failure to award attorney fees may have been an abuse of discretion. *Id.* at 752-753. However, because we are already remanding this case to the trial court for reconsideration of the alimony award, we decline to order an award of attorney fees. Instead, we order the trial court to reconsider this issue in light of its alimony award on remand.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Richard A. Bandstra

/s/ Joseph B. Sullivan

¹ The court suggested that plaintiff had the ability to work "in some form or fashion." The court also suggested that plaintiff could "generat[e] some monies for herself or do good or charity for others or do something."

² The Washtenaw County Guideline uses a weighted point scale to calculate the strength of an alimony claim. The point system attempts to quantify some of the *Parrish* factors noted above. The total point score (T) is then used to determine a recommended alimony amount using the following formula: Alimony per year = $T/100 \times E$. E is simply the difference between the payor's gross income and the recipient's gross income divided by two. Thus, where the payor has all the income, $E = \text{payor's income}/2$. An illustration may be helpful. Assume a weighted point score of 50. If the payor has a gross income of \$100,000 per year, and the recipient has no income, the guideline recommends an alimony award of \$25,000 per year ($50/100 \times \$100,000/2 = \$25,000$). If all other circumstances remain the same, but the payor has an income of \$200,000, the guideline recommends an award of \$50,000 per year ($50/100 \times \$200,000/2 = \$50,000$).

³ The guideline does not carry the force of law, but is used informally by many courts and attorneys.

⁴ This figure represents the parties' total income for that year as reported on their joint income tax return (\$121,000), minus alimony that was apparently being paid to defendant's first wife (\$22,000).

⁵ Again, this figure is taken from the parties' joint income tax return.

⁶ The trial court commented briefly on this point: "I just at least want the record to reflect, and [plaintiff] acknowledged it, that [defendant] has to himself that individual capacity to make money." Indeed, plaintiff did acknowledge that defendant had a unique ability, and that she could not take credit for his medical skill. However, we do not believe that plaintiff was disclaiming any contribution to defendant's earning ability. In fact, she testified that she played an important part in helping defendant open an eye clinic. The clinic apparently provided defendant with most of his income.

⁷ Defendant was apparently able to pay his attorney fees as the action progressed. Because his fees were paid before the judgment of divorce was entered, we conclude that those payments must have come from marital assets.