

STATE OF MICHIGAN
COURT OF APPEALS

JAMES ALLEN KAYLOR,

Plaintiff-Appellee,

v

PAMELA SUE KAYLOR,

Defendant-Appellant.

UNPUBLISHED

December 15, 1998

No. 204722

Cass Circuit Court

LC No. 96-000120 DO

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right from the judgment of divorce and the order denying her motion for reconsideration and/or amendment of judgment. We affirm in part, but remand the issue of the amount of alimony awarded to defendant.

I

Defendant first argues that the trial court's findings of fact regarding its award of alimony were clearly erroneous and its award of alimony was unfair and inequitable. We will uphold the trial court's factual findings unless they are clearly erroneous, and will affirm the court's decision as to alimony unless we are firmly convinced that it was inequitable. *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996).

A

Defendant first claims that the following findings of fact made by the trial court were clearly erroneous: (1) plaintiff's income fluctuated dramatically and was \$104,000 in 1996; (2) the \$10,000 debt on the VISA bill was marital debt; and (3) the division of property favored defendant by \$15,000. Defendant also challenges the trial court's failure to make any findings regarding fault or the conduct of plaintiff which caused the breakdown of the marriage.

First, we do not believe that the trial court clearly erred in determining that plaintiff's income fluctuated dramatically and that his current income was \$104,000. Neither plaintiff nor defendant testified as to the amount of plaintiff's income before 1991. However, evidence was presented that, between 1991 and 1995, from one year to the next, plaintiff's income could increase or decrease as much as \$35,000. We do not believe it was clearly erroneous for the trial court to characterize that variance as "dramatic."

Regarding plaintiff's current income, the record reveals that defendant received a weekly draw of \$2,000 against commissions. Defendant testified that in December 1996 and January 1997 he earned only enough commissions to cover half the draws he received and that he would have to repay the draws from later-earned commissions. The trial court did not clearly err in finding that defendant's yearly income was \$104,000 (\$2,000 x 52 weeks) and not some greater amount.

2

Defendant next claims that because the court erroneously found that the VISA debt was marital debt and awarded the Wrico stock, which it valued at \$7,000 to plaintiff, it made the mistaken conclusion that the division of assets favored defendant by \$15,000. We disagree.

The trial court actually determined that the marital debt remaining on the VISA was \$9,000 and that plaintiff was responsible for the debt. Because it assigned the debt to plaintiff, the court awarded him the Wrico stock so that he could sell it to pay off the debt. Defendant contends that the VISA debt was not marital; however, evidence was presented that the majority of the balance was for personal, rather than business, expenses. Although plaintiff could not state the amount of expenses attributable to defendant, at least some of the expenses were hers and plaintiff paid off the amount owing on another credit card used by defendant for her personal expenses. The trial court did not clearly err in determining that the bill was marital debt.

Defendant does not explain how the court's finding that the VISA debt was marital debt leads to the conclusion that the division of assets favored her by \$15,000. After reviewing the record, we find no basis on which to conclude that the trial court's findings in this regard are clearly erroneous. See *Beason v Beason*, 435 Mich 791, 804-805; 460 NW2d 207 (1990) (court's findings are presumptively correct and the burden is on the appellant to show clear error).

3

Defendant further claims that the trial court clearly erred by not making findings of fact regarding fault or plaintiff's conduct in causing the break up of the marriage. "The trial court should make specific findings of fact regarding those factors that are relevant to the particular case." *Ianitelli v Ianitelli*, 199 Mich App 641, 642-643; 502 NW2d 691 (1993). Here, the trial court stated:

The Court is required by case law to consider the relevant factors such as the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case. The Court has examined those relevant factors.

However, the court did not make any statements with regard to fault or plaintiff's conduct toward defendant during the marriage or period of separation.

Although defendant suggested that plaintiff was unfaithful during their marriage, there was no evidence presented from which to determine, contrary to plaintiff's testimony, that he was. Regarding the issue of defendant's weight, plaintiff admitted that he did not want his wife to be overweight, but claimed that the reason that his marriage failed was because his wife blamed him for her weight gain. Thus, each party testified that the conduct of the other caused or contributed to the break down of the marriage. The trial court was entitled to weigh the credibility of the parties and determine that plaintiff was not solely responsible for the couple's break up. *Thames v Thames*, 191 Mich App 299, 302; 477 NW2d 496 (1991). It cannot be said that the trial court was required to base its dispositional ruling on a finding that plaintiff was at fault for the breakdown of the marriage.

B

Next, defendant argues that the trial court's award of alimony was unfair and inequitable. "A divorce court has the discretion to award alimony under MCL 552.23; MSA 25.103 'as it considers just and reasonable' in light of all the circumstances." *Ianitelli, supra* at 642-643. "The main objective of alimony is to balance the incomes and needs of the parties in a way that would not impoverish either party." *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995).

Plaintiff and defendant separated on January 15, 1996, after nearly eighteen years of marriage. After the parties separated, plaintiff made the payments on the marital home until it was sold in March 1996. The parties divided virtually all of the marital property by mutual agreement. On March 4, 1996, plaintiff began paying defendant \$450 per week in temporary spousal support, pursuant to agreement of the parties. This amount was later reduced to \$215 after he lost his job. Plaintiff continued paying that amount until trial. After trial, the court ordered that plaintiff continue paying that amount for eighteen months after the date of the judgment of divorce, which was May 14, 1997.

Defendant testified that her monthly expenses were \$2,300. She earned approximately \$220 to \$230 per week. This amount, when added to her \$215 in weekly alimony, leaves a deficit of approximately \$415 per month.¹ In contrast, defendant earns approximately \$104,000 per year, presumably before taxes. Estimating that he pays 30% in taxes, monthly income is approximately \$6,067. After paying \$930.95 for alimony, \$800 for living expenses, \$650 for his car, \$500 for his boat and \$400 for life insurance, he is left with approximately \$2,786 each month.

Defendant testified that she obtained approximately \$57,000 from the division of marital assets with plaintiff. However, at the time of trial, she had only \$3,000 remaining from that money because she was required to spend that money to pay for her living expenses. In making its award of alimony to defendant, the trial court stated that defendant already received a substantial amount of cash assets. The court also indicated that it took into account that plaintiff assumed all the marital debt, which was significant and that the property division favored defendant by \$15,000.

We believe that the fact that defendant had spent virtually all of her cash settlement within approximately one year influenced the court not to increase the amount of alimony beyond \$215.

[W]here both parties are awarded substantial assets, the court, in evaluating a claim for alimony, should focus on the income-earning potential of the assets and should not evaluate a party's ability to provide self-support by including in the amount available for support the value of the assets themselves. [*Id.* at 296.]

In the present case, the parties were married for approximately eighteen years. Plaintiff's income is substantially greater than defendant's, and it will take a significant amount of time for defendant to build a client base sufficient to earn a salary on which to sustain herself. If defendant's monthly expenses can legitimately be explained and alimony is not increased, defendant apparently has no way to meet her monthly expenses. On the other hand, increasing the amount of alimony will not likely detrimentally affect plaintiff's financial position. He has had stable, steady employment and there is no indication that it will not continue. Therefore, we remand to the trial court for a determination of whether defendant can reduce her expenses without becoming impoverished. See *Hanaway, supra*. If not, the trial court should increase the award of alimony accordingly.

II

Defendant also argues that the trial court erred in awarding her \$1,500 in attorney fees rather than the \$2,500 she requested. "Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit, and this Court will not reverse the trial court's decision absent an abuse of discretion." *Hanaway, supra* at 298.

In awarding defendant \$1,500 in attorney fees, the trial court took into account the need of the parties to either perpetuate or defend the action, complexity and needless presentation of evidence, and who may be at fault for procrastinating or delaying the case. In this relatively straightforward case, in which the parties essentially agreed to the division of marital property, we do not believe that the trial court's award of attorney fees was an abuse of discretion.

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

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Richard A. Bandstra

¹ The trial court concluded that defendant's monthly expenses were "a little high" and noted that she may no longer have the luxury of spending \$100 a month on gifts or placing \$100 a month into savings. However, even if defendant omits those two expenses, she still needs \$215 more than her salary and alimony to cover monthly expenses.