

STATE OF MICHIGAN
COURT OF APPEALS

JOYCE ALLEN,

Plaintiff-Appellee,

v

JAMES ALLEN,

Defendant-Appellant.

UNPUBLISHED

December 22, 1998

No. 200999

Wayne Circuit Court

LC No. 95-507577 DM

Before: Holbrook, Jr., P.J., and Markey and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce. We affirm in part, reverse in part, and remand for further proceedings.

I. Factual Background

The parties apparently began living together in 1977. They were married on February 10, 1984. During the course of their relationship, the parties had four children. Plaintiff described serious acts of physical and verbal abuse that she asserted defendant committed against her. Defendant denied ever having had a physical altercation with plaintiff, although he did admit threatening her after he had allegedly been threatened by a man he described as plaintiff's boyfriend. The parties also disputed whether certain properties were owned by defendant or by third parties. The trial court in its oral findings concluded that defendant committed "grievous conduct" including violence. In the judgment of divorce, the trial court treated the disputed properties as part of the marital estate that it divided among the parties. Also, the trial court granted plaintiff "spousal support" or alimony of \$100.00 per week for five years and increased the level of child support that defendant was obligated to pay retroactive to January 1, 1994.

II. Retroactive Modification of Child Support

Defendant first argues that the trial court erred by granting an award of retroactive child support. We agree in part. Generally, an award of child support will not be reversed absent an abuse of discretion. *Ghidotti v Barber (On Remand)*, 222 Mich App 373, 377; 564 NW2d 141 (1997).

In the present case, there was a retroactive modification of child support. The previously entered child support order was not a temporary order of support. Thus, the prior support order was not subject to retroactive modification under MCL 552.603(3); MSA 25.164(3). With regard to child support orders generally, MCL 552.603(2); MSA 25.164(2) states:

Retroactive modification of a support payment due under a support order is permissible with respect to any period during which there is pending a petition for modification, but only from the date that notice of the petition was given to the payer or recipient of support.

Thus, the plain language of the statute prohibits retroactive modification prior to the date of notice of a petition for modification of the child support order. *Waple v Waple*, 179 Mich App 673, 675-676; 446 NW2d 536 (1989).

In this case, the trial court abused its discretion by granting a modification of child support retroactive to January 1, 1994, because plaintiff did not file the pertinent motion to increase, that is to modify, the child support order until May 28, 1996. Further, there is no proof of service accompanying the May 28, 1996, petition for modification of the amount of child support or other documentation showing that defendant was ever served a copy of this motion. However, the record does reflect that on or about June 12, 1996, plaintiff's counsel mailed to defendant's counsel a copy of a proposed order that provided in pertinent part that "the issue of child support shall be referred to the Office of the Wayne County Friend of the Court for review and recommendation." On June 27, 1996, this order was entered by the trial court. Thus, it appears that defendant was on notice of the petition for an increase in child support at some point in June, 1996. However, because the exact date on which defendant was placed on notice of the petition for an increase in child support is unclear, we reverse the trial court's retroactive modification of child support and remand for further proceedings related to this matter. On remand, the trial court shall determine the date that defendant was placed on notice of the pertinent petition for modification of child support and make the increase in child support retroactive only to that date. We underscore that our decision in no way effects defendant's child support obligation for the period of time commencing with the date of entry of the judgment of divorce.

III. Inclusion of Certain Properties in the Property Settlement

Defendant claims that the trial court erred by including certain properties in the marital estate. We disagree. We review the trial court's findings of fact under the clearly erroneous standard. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Wiley v Wiley*, 214 Mich App 614, 615; 543 NW2d 64 (1995). If the findings of fact are upheld, then we must decide whether the dispositive ruling was fair and equitable in light of those facts. *Sparks, supra* at 151-152. In this regard, we are to affirm the ruling unless we are left with the firm conviction that the division was inequitable. *Id.* at 152.

Defendant argues that certain properties that the trial court included in the estate were actually owned by third parties. Before the trial court, defendant claimed that one of the properties was owned by his mother, that some of the properties were owned by an investment company and even that one of the properties was owned by the Catholic Church.¹ Defendant also contends that one property was

acquired prior to the marriage and that several other properties were purchased after plaintiff and defendant separated.

We give special deference to a trial court's findings when they are based on the credibility of the witnesses. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Defendant claimed that he did not own certain properties, yet the tax bills for these properties were in defendant's name. Also, defendant argues on appeal that when he purchased one of the properties, he was a single man. However, defendant testified that he was not a single man at the time he purchased that property. Furthermore, the trial court made it clear that it did not believe defendant's testimony. Finally, as to the properties defendant claims were acquired before marriage or after the separation, defendant only cites to his own testimony to support his contention that the trial court improperly included these properties in the marital estate. In light of the trial court's decision, it is obvious that it did not find defendant to be a credible witness. Therefore, in light of our special deference to a trial court's assessment of witness credibility, *Draggoo, supra*, and the testimony at trial, we hold that the trial court did not clearly err in determining which properties to include in the marital estate. *Sparks, supra* at 151; *Wiley, supra*. Further, we do not have a firm and definite conviction that the trial court's division of the marital estate was inequitable. *Sparks, supra* at 152. Thus, we affirm the trial court's determination of the marital estate and its division of the marital estate.

IV. Award of Alimony to Plaintiff

Defendant's final claim of error on appeal is that the trial court erred because it did not consider, on the record, the factors to be considered in determining an award of alimony. However, the trial court's findings are adequate because they are sufficient to facilitate appellate review. *Torakis v Torakis*, 194 Mich App 201, 203-204; 486 NW2d 107 (1992).

Defendant also claims that plaintiff is not entitled to alimony. Defendant argues that the incomes of plaintiff and defendant are not disparate, the marriage was relatively short, the property plaintiff received provides her with the necessary finances to support herself, the marriage did not prevent plaintiff from seeking employment and plaintiff's income from her business was ignored. In deciding upon an award of alimony, relevant factors include "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." *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996). The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. *Magee, supra*.

Our review of the trial court record reveals that defendant made \$52,916 in 1995 and plaintiff made \$22,419 in 1995. Defendant also argues that the property awarded to plaintiff provides her with the necessary finances to support herself. However, the testimony at trial established that property that defendant gave to plaintiff had back taxes due of nearly \$6,000. Furthermore, there was extensive testimony at trial as to defendant's physical and verbal abuse of plaintiff. Based upon the evidence presented at trial, the trial court's findings of fact were not clearly erroneous, *Sparks, supra* at 151; *Wiley, supra*, and the award of alimony was not inequitable. *Sparks, supra* at 152. Thus, we affirm the award of alimony.

V. Conclusion

Reversed and remanded for further proceedings as to the retroactive award of child support. In all other aspects, the judgment of divorce is affirmed. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ Donald E. Holbrook, Jr.

/s/ Jane E. Markey

/s/ William C. Whitbeck

¹ Notably, there is no indication that the Catholic Church or any entity affiliated with it has attempted to intervene to protect the Church's alleged interest in this property.