STATE OF MICHIGAN

COURT OF APPEALS

JACK DOUGLAS PASSWATERS, Plaintiff-Appellee, v SANDRA KAY PASSWATERS, Defendant-Appellant.	UNPUBLISHED September 3, 1999 No. 204310 Kent Circuit Court LC No. 95-001786 DO
JACK DOUGLAS PASSWATERS, Plaintiff-Appellant, v SANDRA KAY PASSWATERS, Defendant-Appellee.	No. 204311 Kent Circuit Court LC No. 95-001786 DO

Before: Kelly, P.J., and Gribbs and Fitzgerald, JJ.

PER CURIAM.

Plaintiff and defendant each appeal as of right a judgment of divorce.[1] We affirm.

I. Basic Facts and Procedural History

The parties were married in May 1973. Plaintiff left the marital home in the fall of 1994, and the judgment of divorce was entered on June 2, 1997. At that time, plaintiff was age 53 and defendant was age 51. No children were born to the marriage.

Since 1982, plaintiff has been employed as vice-president of Shield Insurance Services. Plaintiff's weekly gross income was $1,234. Plaintiff also earned annual bonuses, which totaled approximately $17,570 in 1996, $16,000 in 1994 and 1995, and $4,000 in 1993. Plaintiff cannot

anticipate in advance the amount of bonuses he will receive. Plaintiff did not object to paying some spousal support during defendant's transition from dependence on his income.[2] Specifically, plaintiff proposed that he pay spousal support in the amount of $332 per week until March 1, 1997, then $232 per week until December 31, 1997, and that effective January 1, 1998, he would pay $132 per week until he reached the age of sixty-two or until defendant remarried or cohabited with another man.

According to her testimony, defendant worked at various times during the marriage in clerical or secretarial positions. Her last employment was in 1984. She presented evidence that she had a history of petit mal seizure disorder, reactive hypoglycemia, fibromyalgia, peptic ulcer disease, irritable bowel syndrome, recurrent pelvic infections and lumbar radiculopathy, and that she took numerous medications. Defendant's position at trial was that these medical conditions negatively impacted her ability to find and maintain employment. However, plaintiff maintained that defendant is employable and that she has refused since 1984 to seek employment.

The trial court found that the medical evidence presented at trial established that none of defendant's medical conditions would prevent her from performing sedentary work, on at least a part-time basis. With regard to spousal support, the court stated:

> What I've done on alimony, Counsel, I'm going to order that he pay $500 per week for two years. Now, at the end of two years, I will let her petition for a continuation, but it's going to be a very, very heavy burden on her to convince me that she still needs money.
>
> This two years will get her out there. She's going to have to get some training. She's not really been in the job market since 1984 or '88, somewhere quite a ways back. There's no reason why she can't get in the job market physically. I don't think there's a real serious problem why she can't get in there mentally, although she may need some counseling. Plus, she does need some time to get her skills up to speed, computers or otherwise, and so this will give her two years to kind of get organized here.

With regard to the marital assets, the parties essentially agreed upon an equal division of assets. However, plaintiff asserted that defendant's stock interest in her family's farm in Iowa was marital property subject to division. The farm was owned by defendant's parents, who created stock in the farm as an estate planning device. At the time of trial, defendant owned twenty-two percent of the stock, and had a remainder interest in another fifteen percent of the stock, subject to her mother's life estate. The stipulated value of the farm was $450,000. The trial court, finding that plaintiff did nothing to acquire the property, that the property did not enhance in value during the marriage, and that there were sufficient other assets to support the parties, determined that the farm stock was defendant's individual property and was not a marital asset subject to division.

II. Proceedings on remand from the Court of Appeals

While the appeal of right of the judgment of divorce was pending before this Court, defendant petitioned the trial court for continued spousal support pursuant to the provision in the judgment of divorce. Following oral arguments on this matter, this Court issued an order remanding this matter to the trial court for the limited purpose of conducting an evidentiary hearing on the petition. This Court also ordered the trial court to consider the deposition testimony of the parties' expert witnesses, including the deposition of defendant's expert, Roy Welton, in ruling on the petition.

On remand, the trial court considered the testimony of both parties, as well as eighteen exhibits, including the depositions of plaintiff's two expert witnesses and defendant's two expert witnesses. Plaintiff's experts, Dr. Dark, M.D., and Dr. Spahn, a psychologist, as well as defendant's expert, Dr. Maurer, M.D., agreed that none of defendant's medical conditions would render her unable to work on at least a part-time basis. Defendant's expert psychologist, Dr. Welton, concluded that defendant can work, but that as a practical matter she is not employable. The trial court, relying on the medical testimony, concluded that defendant was capable of at least part-time sedentary employment. The trial court ordered plaintiff to pay permanent alimony of $250 per week until plaintiff retired, defendant remarried, or either party died. The trial court also indicated that it wanted to review the alimony provision when defendant's mother dies and defendant becomes joint owner of the farm property and stock.

Following the trial court's rulings on remand, the parties submitted supplemental briefs to this Court. Essentially, plaintiff contends that he has no objection to permanent spousal support at the amount of $250 per week. However, plaintiff objects to permanent spousal support at any amount higher than $250 per week. Defendant, on the other hand, contends that permanent spousal support in the amount of $250 per week is inadequate in light of her inability to work, her expenses, and plaintiff's ability to pay.

III. Review of the amount and permanency of the spousal support order

This Court reviews a trial court's findings of fact under the clearly erroneous standard before deciding whether a dispositional ruling, such as an award for spousal support, is fair and equitable in light of the findings. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). Pursuant to this standard, we must not reverse the trial court's factual findings if its view of the evidence is plausible. *Thames v Thames*, 191 Mich App 299, 301-302; 477 NW2d 496 (1991). Spousal support should be based on what is just and reasonable under the circumstances, *Maake v Maake*, 200 Mich App 184, 187; 503 NW2d 664 (1993), taking into account the length of the marriage, contributions of the parties to the marital estate, the parties' earning abilities, the parties' past relations and conduct, their ages, needs, ability to work and health, and fault, if any.

A. Amount

Defendant first takes issue with the trial court's finding regarding defendant's ability to work. The trial court found, based on the medical evidence presented, that defendant is medically able to work and that she simply made no effort to get training or to find a job during the two years since the divorce.

We conclude that the trial court's finding regarding defendant's ability to work is well supported by the record.

Defendant also contends that the trial court's decision to reduce alimony was erroneous in light of defendant's expenses. In its original award of spousal support, the trial court indicated that defendant would bear a heavy burden in establishing a continuing need for spousal support after the initial two-year period. The trial court premised the reduced spousal support award on its finding that defendant has the ability to work but has chosen not to freshen her job skills or to attempt to gain employment. The trial court also premised the award on the fact that the parties received an equal distribution of the marital assets, and on the permanency of the award. The trial court's view of the evidence is highly plausible and we will not reverse its findings. *Thames*, *supra* at 302.

B. Permanency

Defendant suggests that plaintiff has abandoned his original argument regarding the duration of spousal support because he testified on remand that he did not object to paying reasonable support "throughout the rest of my work life" or "for the next ten years." However, defendant has taken plaintiff's comments out-of-context, and a review of the comments in context reveals that plaintiff has not abandoned any arguments with regard to the duration of spousal support. However, since plaintiff has indicated in his brief on appeal that he has no objection to the award of permanent alimony at the amount of $250 per week, and we are affirming that amount, we need not decide whether the trial court erred by awarding permanent spousal support.

IV. Defendant's family farm

On cross-appeal, plaintiff argues that the trial court erroneously determined that defendant's interest in her family's farm was not marital property subject to division. The distribution of property in a divorce is controlled by statute. MCL 552.1 *et seq*.; MSA 25.81 *et seq*. *Reeves v Reeves*, 226 Mich App 490, 493; 575 NW2d 1 (1997). In granting a divorce, the court may divide all property that came to either party by reason of the marriage. MCL 552.19; MSA 25.99. When apportioning marital property, the court must strive for an equitable division of increases in marital assets that may have occurred between the beginning and the end of the marriage. *Id.* Thus, the trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets. *Id.* Generally, the marital estate is divided between the parties, and each party takes away from the marriage that party's own separate estate with no invasion by the other party. However, a spouse's separate estate can be opened for redistribution when one of two statutorily created exceptions is met. MCL 552.23, 552.401; MSA 25.103, 25.136.

The first exception to the doctrine of noninvasion of separate estates permits invasion of the separate estates if after division of the marital assets "the estate and affects awarded to either party are insufficient for the suitable support and maintenance of either party." MCL 552.23; MSA 25.103. As interpreted by our courts, invasion is allowed when one party demonstrates additional need. *Reeves*, *supra* at 494-495. The second exception permits invasion of the separate estates only when the other spouse "contributed to the acquisition, improvement, or accumulation of the property." MCL 552.401;

MSA 25.136. When one significantly assists in the acquisition or growth of a spouse's separate asset, the court may consider the contribution as having a distinct value deserving of compensation. *Reeves, supra* at 494-495.

Plaintiff relies on the second exception in arguing that he is entitled to a portion of defendant's shares in the farm.. Specifically, plaintiff contends that his hard work allowed defendant to remain home without working outside the home and to rely on her interest in the family farm as a contribution to their retirement. However, it is undisputed that plaintiff did not work on the farm, and no evidence was presented that the value of the farm stock appreciated during the course of the marriage or that defendant's remaining at home did anything to increase the value of the farm stock. Moreover, we give deference to the trial court's determination that no credible evidence was presented that defendant intended her contribution to the parties' retirement to be her interest in the family farm. *Thames, supra* at 302. Under these circumstances, the trial court properly determined that defendant's interest in Clampitt Farms was not a marital asset subject to division.

V. Attorney fees

Plaintiff also argues that the trial court abused its discretion by ordering plaintiff to pay defendant's attorney fees. Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). Attorney fees may also be authorized to enable a party to prosecute or defend a suit. *Id.* at 298. A party should be not required to invade assets to satisfy attorney fees when the party is relying on the same assets for support. *Id.*

Here, defendant was required to defend the suit with regard to the issues of both property division and alimony. Because defendant had no current employment, and at best could not be expected to gain full-time employment within a short period of time, the court determined that defendant needed to invade the assets she was awarded in the divorce proceedings to pay her attorney fees, and that she needed those assets to pay for living expenses not covered by the award of alimony. The court also determined that plaintiff had the ability to pay the fees. We find no abuse of discretion in this determination. *Hanaway, supra* at 298.

Finally, plaintiff argues that the trial court's definition of "cohabitation" in the provision of spousal support was erroneous because it provides only for termination of spousal support if defendant cohabits with another person in a relationship that is equivalent to a marital relationship. He contends that cohabitation with any person with whom defendant shares expenses lessens defendant's need for support.

The final judgment of divorce stated:

> Furthermore, the Plaintiff's obligation to pay spousal support shall automatically terminate upon the occurrence of the first of the following: January 7, 1999; the death of either party; the remarriage of the Defendant; upon such time as the Defendant cohabitates [FN: Cohabitation used in the judgment shall mean the definition found in

> Black's Law Dictionary (5th edition)] with another person with whom she is sharing expenses.]

Similarly, the Order Amending Judgment of Divorce provides:

> The Plaintiff's obligation to pay spousal support shall automatically terminate upon the occurrence of the first of the following: the death of either party; the retirement by Plaintiff from his employment; the remarriage of the Defendant; or upon such time as the Defendant cohabitates with another person with whom she is sharing expenses, with cohabitation being defined as set forth in Black's Law Dictionary (5th edition).

Black's Law Dictionary (5th edition) defines cohabitation as: "To live together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations."

We find no error in the trial court's language in either the final judgment of divorce or the Order Amending Judgment of Divorce that spousal support would cease if defendant cohabited with another individual, as defined by Black's Law Dictionary. The court explained that the purpose of alimony is to allow a spouse in need of support to continue to receive support after a divorce and that, if defendant cohabited with another person, such as her mother, plaintiff's responsibility to pay alimony would not be abrogated. This reason is supported by the definition of cohabitation, which likens it to a marriage relationship. Moreover, "cohabitation" as used by this Court in *Ianitell, supra* and *Petish v Petish*, 144 Mich App 319; 375 NW2d 432 (1985), involved situations where an ex-wife lived with another man in an apparently romantic manner. This Court held that cohabitation alone was not sufficient to obviate the ex-husband's obligation to pay alimony. It follows, therefore, that merely sharing a home and expenses with another person without romantic involvement does not mandate termination of spousal support.

Affirmed.

/s/ Roman S. Gribbs
/s/ E. Thomas Fitzgerald

[1] Plaintiff has raised an issue regarding the failure of the trial court to consider the deposition of Roy Welton in determining the amount of spousal support to be awarded, and both plaintiff and defendant have raised arguments regarding the propriety of the trial court's original award of spousal support to defendant in the amount of $500 per month for two years. However, in light of this Court's order remanding this case to the trial court to enable it to review the issue of spousal support pursuant to the judgment of divorce, these particular arguments are now moot.

[2] At the time of trial, plaintiff indicated that he had been paying $430 per week in spousal support for over two years and had been paying defendant's health and automobile insurance.