STATE OF MICHIGAN

COURT OF APPEALS

SALLY ANN HALL,

Plaintiff-Appellee,

v

CARMEL J. HALL,

Defendant-Appellant.

UNPUBLISHED
January 4, 2000

No. 212996
Barry Circuit Court
LC No. 97-000296 DM

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's judgment of divorce. We affirm.

This case involves the breakdown of a twenty-five-year relationship, including an eighteen-year marriage between plaintiff and defendant. The parties' marriage, although of long duration, appears to have been a troubled one. At trial, both parties alleged abuse by the other throughout the course of the relationship. On the basis of these allegations, the trial court found fault to be relatively equal and awarded plaintiff fifty-three percent of the marital assets. However, the court further found that in light of the lengthy nature of the parties' relationship, as well as the disparate income earning ability of the parties, plaintiff was entitled to an offset against defendant's portion of the marital assets in lieu of alimony. In doing so, the trial court imputed an income of $52,000 per year to defendant on which to base both child support and the alimony offset. On appeal, defendant does not challenge the awards of alimony and child support themselves, but rather the court's imputation of income, arguing that in light of the evidence presented at trial there was no basis to impute to defendant an income of $52,000 per year.

Defendant first argues that the trial court erred in imputing income to him because there was no evidence showing that defendant had voluntarily reduced his income. We disagree. A trial court does not abuse its discretion by entering its child support order based upon the unexercised ability to earn where a party voluntarily reduces his or her income, *Rohloff v Rohloff*, 161 Mich App 766, 775-776; 411 NW2d 484 (1987):

> Rather . . . where a party voluntarily reduces his or her income, or, as in this case, voluntarily eliminates his or her income, and the trial court concludes that the party has the ability to earn an income and pay child support, we do not believe that the trial court abuses its discretion by entering a support order based upon the unexercised ability to earn. [*Id.*]

This Court has extended this rule "to encompass the determination of alimony." *Healy v Healy*, 175 Mich App 187, 191-192; 437 NW2d 355 (1989). In such cases, this Court will not substitute its judgment for that of the trial court unless the trial court abused its discretion or this Court is convinced it would have reached a different result. *Id.*; *Knowles v Knowles*, 185 Mich App 497, 498; 462 NW2d 777 (1990).

As the trial court noted, the testimony and evidence in this case raised many unanswered questions, the majority of which surround defendant's income and business dealings after the parties' separation in late 1996. Upon review of the trial court's opinion, it is apparent that the court's decision to impute income was based only partially on what evidence the record affirmatively disclosed. As the trial judge indicated, it was what the record failed to disclose, as a result of defendant's "purposeful" withholding of evidence, that led the court to imputation as a basis for calculating a proper award of alimony and child support. We believe, after review of the record, that the trial judge's characterization of the testimony and evidence is apt and accurate.

In support of his claim that no evidence of a voluntary reduction in income exists, defendant argues that his withdrawal from the International Hardwoods timber business partnership was not a voluntary escape from employment, noting that he was asked to leave by his partners. However, while there is certainly evidentiary support for this argument based upon the testimony of his business partners, it is obvious that the trial court found such testimony not credible, a finding also supported by the evidence at trial. As the trial court noted, defendant's withdrawal from the partnership suspiciously occurred just as the parties separated. Then, despite his withdrawal, defendant continued to work with the company for almost one year, writing contracts, receiving weekly wages, and, in addition to these wages, receiving at least two large payments as a result of some timber deals, which seem consistent with a partner's share of the profits. Further, the trial court noted that defendant had a tendency to become unemployed or to experience a reduction in income right before court hearings. The trial court obviously found defendant's explanation for these coincidental reductions in income not credible. It has long been recognized that the trial judge is in a better position to test the credibility of the witnesses by observing and hearing them in open court. *Johnson v Johnson*, 363 Mich 354, 357; 109 NW2d 813 (1961). Upon review of the record, we cannot say that the trial court's findings are clearly erroneous, nor that the trial court abused its discretion in reaching its decision to impute income to defendant.

Regarding the amount of income imputed, defendant argues that because the evidence indicates that between 1992 and 1998 he earned an average yearly income of only $32,000, the trial court abused its discretion in imputing an income of $52,000. Again, we disagree. We review the factual findings of a trial court in a divorce case for clear error. *Wellman v Wellman*, 203 Mich App 277, 278; 512 NW2d 68 (1994). "A finding is clearly erroneous if the appellate court, after considering all the evidence, is left with a definite and firm conviction that a mistake has been committed." *Id.*

Defendant's argument presumes that the trial court must accept defendant's statement of his income. Although defendant submitted his individual tax returns for the years between 1992 and 1996, the trial court chose not to believe that those returns were a true statement of defendant's actual income or of his ability to earn, a decision within its discretion as the trier of fact. To the contrary, the trial court appeared to believe plaintiff's allegations at trial regarding defendant and his partners engaging in cash sales of logs, which defendant allegedly told her were not reported as income for tax purposes. Further, the trial court found that defendant had the ability to earn a yearly income of $68,000, and on that basis imputed a yearly income of $52,000.

Upon review of the record, we are not left with a definite and firm conviction that a mistake was made. The weekly wage and additional income from timber contracts earned by defendant after his separation from International Hardwoods indicate that defendant certainly had the ability to earn the yearly income of $52,000 imputed to him by the trial court. In light of the testimony and evidence produced at trial, and giving due deference to the court's findings of credibility, we do not believe that the trial court clearly erred in imputing a yearly income of $52,000.

Next, defendant argues that the trial court erred in attributing $20,000 cash it found to be in defendant's possession to defendant as marital property for purposes of distribution. We disagree. "A divorce case is equitable in nature, and a court of equity molds its relief according to the character of the case; once a court of equity acquires jurisdiction, it will do what is necessary to accord complete equity and to conclude the controversy." *Wiand v Wiand*, 178 Mich App 137, 144; 443 NW2d 464 (1989), quoting *Schaeffer v Schaeffer*, 106 Mich App 452, 457-458; 308 NW2d 226 (1981).

Here, the record reveals that the court apparently concluded that defendant did a substantial amount of business on a cash basis and thus was in possession of cash not disclosed to the court. It further appears that the court found $20,000 to be a reasonable amount based upon the testimony of plaintiff regarding cash from the sale of logs she had allegedly seen defendant counting in their kitchen in early 1997.

Defendant further argues that because plaintiff could not substantiate her allegations of cash transactions, nor could she testify that the alleged cash had not been turned over to International Hardwoods, the trial court erred in attributing that amount to defendant. However, by its nature plaintiff's claim could not generally be supported with any further direct evidence, as one purpose of doing business on a cash basis is to avoid tax liability. To leave records of such cash is inconsistent with that purpose. Although defendant claimed he never had that amount of money, and that any cash he would have had at the house most likely belonged to International Hardwoods and was turned over to the company, the court apparently found such testimony lacking credibility. Moreover, the court did not rely solely on the testimony of plaintiff, but noted significant circumstantial evidence which apparently weighed in its decision:

> [Defendant] would like me to believe that someone who has basically earned about $32,000 a year in the 1990's, somewhere in the 20's during the 1980's – at least from '87 on – and between '80 and '86 basically had a subsistence income of 10 or 12 thousand dollars a year can somehow acquire relatively new vehicles with little – little

> debt. There is debt on the Chrysler but none on his pickup. He was able to come up with $12,000 to buy the lease on it. And – but beyond that, they have a $130,000 house with no debt on it. It's inconceivable to me that a family with four children could acquire these assets with the income I'm expected to believe here. I don't believe it.

These comments indicate that the court once again found defendant's income claims to lack credibility.

Although the trial court did not have a substantial amount of evidence upon which to base a finding that defendant possessed the disputed amount of cash, based on the testimony at trial such a finding was at least plausible. Affording the trial court the deference required under MCR 2.613(C), we cannot say that such a finding was clearly erroneous.

Defendant next argues that the trial court made erroneous determinations of fact when considering the factors laid out by this Court to determine the appropriate amount of alimony. Initially, we note that defendant has failed to preserve this issue because he did not raise it in the statement of questions presented. MCR 7.212(C)(5); *Marx v Dep't of Commerce*, 220 Mich App 66, 81; 558 NW2d 460 (1996). That notwithstanding, we find no error in the trial court's factual determinations.

In *Parrish v Parrish*, 138 Mich App 546, 557; 361 NW2d 366 (1984), this Court enumerated seven factors to be considered in determining the amount of alimony to be awarded:

> (1) the duration of the marriage, (2) the contributions of the parties to the joint estate, (3) the age of the parties, (4) their health, (5) their stations in life, (6) the necessities and circumstances of the parties, and (7) the earning ability of the parties.

Although this Court reviews an order of alimony de novo, it "will not modify an alimony award unless it is convinced that, sitting in the position of the trial court, it would have reached a different result." *Id.* at 553, quoting *Boyd v Boyd*, 116 Mich App 774, 786; 323 NW2d 553 (1982); *Wilkins v Wilkins*, 149 Mich App 779, 791; 386 NW2d 677 (1986). Defendant contends that the court erred in considering the overall length of the parties' relationship, twenty-five years, because it was required to consider only that time during which the parties were married. We do not believe the court was so limited in its considerations.

Nothing in this state's case law or statutes limits a trial court's consideration to the factors listed above. To the contrary, the statutory authority providing for alimony indicates that the trial court is required to consider all the circumstances of any given case. MCL 552.23(1); MSA 25.103(1). We do not believe that the trial court erred in considering the full extent of parties' relationship, rather than just the eighteen years of marriage, especially where the parties' first child was born during the seven years they were together before their marriage and where plaintiff did not work outside the home except for a brief period in 1991 when she and defendant temporarily separated.

Finally, defendant appears to argue that the court's award of alimony was erroneous in light of the parties' relative ages and occupations. Specifically, defendant asserts that, as a fifty-five-year-old laborer, his earning capabilities will only diminish over the next several years whereas plaintiff, a forty-

four-year-old waitress, is much better situated in regard to income potential. We note that the trial court's award of alimony was not based upon defendant's income potential as a laborer, but rather as a skilled timber broker. The court found, despite defendant's contentions to the contrary, that defendant was skilled in the business of buying and selling timber. Affording the trial court the deference required under MCR 2.613(C), we cannot say that such a finding was clearly erroneous.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey