

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA SUE SMITH,

Plaintiff-Appellant,

v

PAUL DEAN SMITH,

Defendant-Appellee.

UNPUBLISHED

January 29, 2002

Nos. 222536 & 225248

Genesee Circuit Court

LC No. 95-179086-DM

Before: Jansen, P.J., and Doctoroff and Owens, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the trial court's judgment of absolute divorce, as well as the trial court's order terminating defendant's alimony obligation. We affirm in part and reverse in part.

Plaintiff challenges several of the trial court's dispositional rulings. In *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992), our Supreme Court opined:

The appellate court must first review the trial court's findings of fact under the clearly erroneous standard. If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts. But because we recognize that the dispositional ruling is an exercise of discretion and that appellate courts are often reluctant to reverse such rulings, we hold that the ruling should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable.

In addition to the property distribution, this standard of review applies to an alimony award. *Moore v Moore*, 242 Mich App 652, 654-655; 619 NW2d 723 (2000).

Plaintiff contends that the trial court erred by failing to include the so-called "cottage" in the parties' marital estate. The trial court may "apportion all property that has 'come to either party by reason of the marriage.'" *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997), quoting MCL 552.19. "[W]hen apportioning the marital estate incident to a divorce, the court must strive for 'an equitable division of any increase in net worth that may have occurred between the beginning and the end of the marriage.'" *Id.*, quoting *Bone v Bone*, 148 Mich App 834, 838; 385 NW2d 706 (1986). Here, defendant's temporary ownership of a joint interest in the cottage did not result in any increase in the parties' net worth. Moreover, there is no

evidence that defendant ever occupied the residence. Accordingly, we do not believe that the trial court's exclusion of the cottage from the marital estate was clearly erroneous.

Plaintiff also contends that the trial court erred by failing to apply "fault" as a factor in the dispositional rulings. Although defendant conceded to marital infidelity, the evidence suggested that this occurred more than twenty years before plaintiff sought a divorce. Moreover, there was no evidence suggesting that the infidelity was relevant to her decision to file the divorce complaint. One of the parties' daughters did testify that defendant was verbally abusive on occasion; however, she denied that defendant was physically abusive. Accordingly, we are not persuaded that the trial court clearly erred by failing to consider fault in the dispositional rulings.

Plaintiff contends that the trial court also erred by awarding the parties fifty percent of the value of both the marital home and defendant's pension. Instead, plaintiff contends that she should have received the full value of the marital home and sixty percent of the pension. Indeed, it is beyond dispute that plaintiff's health prevents her from having any meaningful income earning ability. Similarly, defendant's health is superior to plaintiff's health, and he possesses a greater income earning potential than she does.

We agree with the trial court's assessment that, unfortunately, the parties' assets and income simply are not sufficient to adequately provide for both parties. In other words, no dispositional ruling could have fully met the needs of both parties. Nevertheless, the trial court noted that the parties' health and earning capacity were different when it made its dispositional ruling. In fact, the trial court ordered defendant to provide plaintiff with at least three years of health insurance and \$275 in weekly alimony. Thus, the trial court's dispositional rulings did attempt to account for these disparities, as necessary to justify dividing the major assets evenly. Although the dispositional ruling may not have provided plaintiff with a sufficiently *large* award, we believe that the trial court's decision provided plaintiff with a sufficiently large *share* of the parties' assets and income, giving due regard to her inferior health and income earning capacity.

On the other hand, we do take issue with one of the trial court's dispositional rulings: the division of the pension. Aside from the alimony and health insurance, the gravamen of the trial court's rationale in dividing the assets was to split them as evenly as possible. For example, it ordered the marital home sold, and the proceeds evenly divided. Similarly, the trial court ordered the pension divided evenly. However, the trial court ordered that the division of the pension would be retroactive to the date the complaint was filed, even though there was no valuation evidence presented corresponding to that date. Indeed, this decision deviated from the trial court's goal of dividing the major assets evenly as of the date of the divorce. Where, as here, the assets are plainly insufficient to support either party, we believe that it was clearly erroneous to backdate the pension valuation. Consequently, to preserve the trial court's dispositional goals, plaintiff's share of the pension should be fifty percent of the value of the pension effective on the date of the judgment.

Plaintiff also challenges the trial court's alimony award, contending that \$275 per week was insufficient to meet her needs and in light of defendant's income earning ability.¹ We note

¹ Contrary to plaintiff's contention on appeal, the trial court ordered the alimony to be
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that defendant was paying \$350 per week in temporary alimony during the pendency of the action. Plaintiff introduced testimony suggesting that her expenses were approximately \$1,700 per month.

Generally, the primary objective of an alimony award “is to balance the incomes and needs of the parties in a way that will not impoverish either party.” *Moore, supra* at 654. Among the factors that may be considered by the trial court are:

(1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties’ ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties’ health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, and (12) general principles of equity. [*Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991).]

Again, this Court need not reverse an alimony award if the alimony award was fair and equitable under the circumstances. *Moore, supra* at 655.

As noted above, there is no dispute that defendant’s health and earning ability are superior to plaintiff’s health and earning ability. However, once the divorce was final, plaintiff’s health insurance would cost defendant approximately \$250 per month. Moreover, plaintiff’s health problems certainly call into question the propriety of the approximately \$400 in monthly automobile expenses claimed by her. It is plausible that the trial court considered some, or all, of this automobile expense inconsistent with plaintiff’s contention that she is unable to work (due, primarily, to narcolepsy) or, at the very least, beyond the scope of defendant’s responsibility. Accordingly, we find support for the trial court’s decision to reduce defendant’s alimony obligation from \$350 per week to \$275 per week. Consequently, the trial court’s alimony award was neither unfair nor inequitable.

Plaintiff also challenges the trial court’s ruling that defendant’s retirement would constitute a material change of circumstances without wording the order to preclude defendant from retiring before the age of 65. Indeed, we are somewhat troubled by defendant’s trial testimony essentially threatening to retire if the alimony award were too great. Nevertheless, the trial court order did not provide that defendant’s retirement would automatically lead to a modification of his alimony award, but instead provided that it would be sufficient to merit a review of his obligation. In other words, the trial court retained the discretion to determine that defendant’s actual retirement was improperly motivated. Moreover, retirement is a sufficient change of circumstances to invite a trial court to consider the modification of an alimony award. *McCallister v McCallister*, 205 Mich App 84, 86; 517 NW2d 268 (1994). Consequently, the trial court’s ruling to that effect, standing alone, was not erroneous.

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“permanent.”

Plaintiff further challenges the trial court's denial of her request for attorney fees. A trial court's decision to deny an award of attorney fees in a divorce action will not be reversed absent an abuse of discretion. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). An abuse of discretion will be found only where "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). Here, with the exception of the health insurance and alimony awards, the trial court attempted to divide the parties' assets as evenly as possible, recognizing that the assets and income would be insufficient to fully meet the needs of both parties. The trial court's efforts, other than the pension valuation date, were largely successful. Requiring each party to pay his or her own attorney fees is consistent with the trial court's efforts to evenly divide the assets. Thus, we cannot conclude that the ruling was an abuse of discretion.

Finally, plaintiff contends that the trial court lacked jurisdiction to terminate defendant's alimony obligation upon his retirement. As a question of law, we review de novo a challenge to the trial court's jurisdiction. *Bass v Combs*, 238 Mich App 16, 23; 604 NW2d 727 (1999).

On October 4, 1999, plaintiff filed a claim of appeal from the trial court's judgment of absolute divorce. MCR 7.208(A) states that "[a]fter a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except by order of the Court of Appeals, by stipulation of the parties, or as otherwise provided by law." Nevertheless, despite plaintiff's objection to the proceedings on jurisdictional grounds pursuant to MCR 7.208(A), the trial court granted defendant's motion to terminate his alimony obligation after the appeal was filed.

It is undisputed that we did not provide the trial court authority, by order, to amend the judgment. Obviously, plaintiff's objections to the proceedings preclude a finding that the parties stipulated to the amendment. Further, we are not persuaded that there was a legal justification for the amendment during the pendency of the appeal. Accordingly, none of the exceptions to MCR 7.208(A) applied, and the trial court was without jurisdiction to amend the judgment to terminate defendant's alimony obligation as long as the appeal was pending. Consequently, we reverse the trial court's order amending the judgment.

Affirmed in part, reversed in part. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Donald S. Owens