STATE OF MICHIGAN

COURT OF APPEALS

SUSAN M. CZAJKOWSKI,

Plaintiff-Appellant,

v

NORBERT P. CZAJKOWSKI,

Defendant-Appellee.

UNPUBLISHED
February 15, 2002

No. 222121
St. Clair Circuit Court
LC No. 93-001962-DO

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiff appeals by right a modified judgment of divorce entered pursuant to a remand order from this Court. Plaintiff claims that the trial court failed to properly implement the orders of this Court on remand and that the case was improperly assigned to Judge Peter E. Deegan. We reverse, vacate the trial court's alimony award, and remand to the Family Division of the trial court for further proceedings.

The facts of this case involve a protracted divorce proceeding that began in 1993 and that has already been before this Court. The primary dispute is over the alimony award. In 1996, the trial court ordered defendant to pay plaintiff $1,200 per week ($62,400 annually) for eight years and to pay $10,000 towards plaintiff's attorney fees. After plaintiff appealed this order, a panel of this Court determined that the award was improperly calculated, noting that plaintiff had limited potential to earn her own income and defendant had an annual income of $700,000. *Czajkowski v Czajkowski [Czajkowski I]*, unpublished opinion per curiam of the Court of Appeals, issued September 4, 1998 (Docket No. 195960). The *Czajkowski I* panel found that the trial court erred by focusing primarily on plaintiff's reasonable needs and giving insufficient weight to other factors such as defendant's ability to pay, the parties' prior standard of living, and general principles of equity. The Court vacated the award and remanded for reconsideration of both the alimony and attorney fees, instructing the trial court to consider all of the factors set forth in *Parrish v Parrish*, 138 Mich App 546; 361 NW2d 366 (1984). On remand, the trial court essentially adopted the recommendation of the Friend of the Court (FOC) that defendant be ordered to pay $7,000 per month ($84,000 annually) for eight years, retroactive to the original award in 1996. The court also increased the award of attorney fees to $35,000.

In this second appeal, plaintiff argues that the trial court erred by adopting the FOC recommendation without making specific and independent findings. A trial court's factual

findings in a divorce case are reviewed for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). Plaintiff argues that the trial court was only permitted to consider the recommendations embodied in the FOC's report, and must reach its own conclusions based on a hearing de novo, citing *Truitt v Truitt*, 172 Mich App 38, 42-43; 431 NW2d 454 (1988). However, there is a critical distinction between *Truitt* and the instant case in that *Truitt* addressed a trial court's order and FOC recommendation regarding change of custody, not an alimony award. An award of alimony is discretionary, *Thames v Thames*, 191 Mich App 299, 307; 477 NW2d 496 (1991), whereas the determination of child custody is strictly governed by a statute that requires a de novo review of the FOC recommendation upon request of a party. *Truit, supra* at 43; MCL 552.507(5). Therefore, we do not consider our holding in *Truitt* to be controlling in this case.

However, we conclude that the trial court erred because it did not follow the specific instructions of this Court on remand. *Czajkowski I* emphasized the disparity between the incomes of the two parties and the principle that alimony was an equitable consideration based not only on the needs of the recipient party, but on the payor's potential income and ability to pay. Noting that marriage is a joint venture, the Court stated that where both partners have contributed to the whole, both should enjoy the benefits. *Czajkowski I* also focused on the following facts: (1) during the fourteen years of marriage, the couple's joint income increased from approximately $100,000 to $700,000, (2) plaintiff was at least partially responsible for the increase in their joint income, and (3) plaintiff's ability to earn an income was limited due to health concerns. Based on the finding that the trial court's initial assessment was inequitable given all of the circumstances of the case, *Czajkowski I* remanded with specific instructions to consider all of the *Parrish* factors.

However, in its opinion on the record, the trial court addressed only four of these factors, the defendant's ability to pay, the prior standard of living of the parties, plaintiff's needs, and general principles of equity. Further, the trial court did not cite any evidence supporting its findings regarding the reasonableness of plaintiff's projected expenses and defendant's reduced standard of living and ability to pay alimony. In the end, the trial court awarded only a negligible increase in the award of alimony, which would appear to fly in the face of the conclusion that the original award was inequitable. A trial court is precluded from taking actions inconsistent with the instructions or judgment of the remanding court. *Barcheski v Grand Rapids Public Schools*, 162 Mich App 388, 394; 412 NW2d 296 (1987). For these reasons, we conclude that the trial court clearly erred by failing to consider all of the *Parrish* factors as instructed and by failing to alleviate the inequity found in the previous award. Therefore, we again vacate the trial court's alimony award and remand this case for reconsideration with the specific instruction to consider all of the *Parrish* factors.

Plaintiff next argues that the trial court clearly erred by reimposing the durational limits on the alimony award vacated by this Court. Because we are vacating the trial court's alimony award, this issue is moot. However, because the issue is likely to arise again after remand to the trial court, we will briefly address plaintiff's argument.

To the extent that the trial court determined that *Czajkowski I* did not vacate the durational limit on the original alimony award, it erred. *Czajkowski I* did not directly address the durational limit on the alimony award; however, the award was vacated in its entirety. On remand, the trial court would have been within its discretion to conclude that the new alimony

award should be limited to eight years, assuming that it properly considered all of the *Parrish* factors and found that a limited award was equitable under the circumstances. We find no error per se in the trial court's determination that the award should be limited to eight years, but again vacate the award in its entirety. On remand, the court shall consider anew, in light of all the *Parrish* factors, both the amount of the award and whether a durational limit is appropriate.

Plaintiff also claims that the trial court erred when it denied plaintiff's motion to take in additional evidence for the purpose of modifying the alimony award. The trial court stated that it did not retain jurisdiction over the case except in regard to implementing our order on remand. Because of this, it ordered all post-judgment issues not involving this Court's remand order to be heard by the Family Division of the court. Under the circumstances, there was no error in not taking jurisdiction over a post-judgment issue, especially when the court would be fashioning a modified award as ordered on remand, and, in fact, did issue a modified order.

Plaintiff next contends that the trial court abused its discretion by awarding attorney fees that were grossly inadequate, forcing plaintiff to use marital assets to pay her fees, contrary to the previous ruling of this Court. A trial court's award of attorney fees will be upheld absent an abuse of discretion. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 644 (1993).

Czajkowski I made clear that the trial court should consider whether an award of attorney fees is necessary to allow plaintiff to carry on the action. The Court also noted that the original award of $10,000 would appear to require that plaintiff invade her property award to pay her attorney fees, which apparently exceeded $100,000, and that, in this case, attorney fees should be properly considered as one of plaintiff's expenses.

There is no indication in the record that the trial court ever received evidence that would support the reasonableness of plaintiff's attorney fees. If plaintiff's fees actually exceed $200,000, then the current attorney fee award of only $35,000 would still require plaintiff to invade her assets and the alimony intended for her support. The court may not require a party to invade her assets to satisfy attorney fees when she is relying on those assets for her support. *Maake*, *supra* at 189; *Kurz v Kurz*, 178 Mich App 284, 289; 443 NW2d 782 (1989). Therefore, it would appear that the trial court abused its discretion in awarding plaintiff only a small portion of her claimed fees.

Because the court has already determined that an award of attorney fees is appropriate in this case, it should either award a reasonable amount of fees based on the evidence plaintiff presented, or, if defendant contests the reasonableness of the fees, hold an evidentiary hearing on the matter. See *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). The trial court should also fully explain the reasons for its decision. *Id*. Therefore, on remand, the trial court should reconsider its award of attorney fees and either provide a full explanation on the record for its determination or, in the alternative, conduct an evidentiary hearing.[1]

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[1] The following factors should guide the trial court in its consideration:

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Plaintiff's final argument is bias on the part of the trial judge. A trial court's factual findings regarding a motion to disqualify a judge are reviewed for an abuse of discretion, and its legal conclusions are reviewed de novo. *Cain v Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996). Plaintiff claims that the judge's rulings are prejudicial to her. MCR 2.003(B)(1) mandates disqualification of a judge where, "[t]he judge is personally biased or prejudiced for or against a party or attorney." A showing of both actual bias and personal bias is required. *Cain, supra* at 495. To establish personal bias, the party must show an extra-judicial origin of the bias, i.e., in events outside the judicial proceedings. *Cain, supra* at 495-96. Moreover, the party seeking disqualification must overcome a heavy presumption of judicial impartiality. *Id*. at 497.

Here, plaintiff failed to make a showing of actual bias. Her points of contention, intended to establish bias, merely show that the judge ruled against her on numerous issues, which does not equate to bias. See *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 729; 591 NW2d 676 (1998). In addition, plaintiff cannot establish personal bias because she did not demonstrate an extra-judicial origin of the alleged bias. Plaintiff implies that the judge's "personal sentiments on the issue of spousal support and or other divorce issues" are the source of the bias, but offers nothing with respect to what those "personal sentiments" might be. This does not satisfy the standard set forth in *Cain, supra*.

Although we do not find sufficient actual or personal bias to warrant disqualification, the trial court's decision after the first remand suggests that the court would have difficulty putting previously expressed views or findings out of his mind. See *Feaheny v Caldwell*, 175 Mich App 291, 309; 437 NW2d 358 (1989). Therefore, we order that the case be reassigned to a new judge in the Family Division of the court to preserve the appearance of justice.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Martin M. Doctoroff
/s/ Helene N. White

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> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expense incurred; (6) the nature and length of the professional relationship with the client. [*Head, supra*, at 114.]