

STATE OF MICHIGAN  
COURT OF APPEALS

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THERESA M. NELSON,

Plaintiff-Appellee,

v

MARK L. NELSON,

Defendant-Appellant.

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UNPUBLISHED

April 17, 2003

No. 235855

Oakland Circuit Court

LC No. 98-614004-DM

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court's judgment of divorce, challenging the award of permanent spousal support to plaintiff and the trial court's decision to value defendant's medical practice as of the time of the filing of the complaint. We affirm, but remand for modification of the provision respecting alimony.

The judgment of divorce, entered in July 2001, incorporated the trial court's written opinion and order, which addressed, inter alia, the issues of spousal support and the value of defendant's practice. After reviewing the eleven factors set forth in *Sparks v Sparks*, 440 Mich 141; 485 NW2d 893 (1992), the trial court concluded that lifetime spousal support was appropriate, subject to the remarriage or cohabitation of plaintiff. The trial court ordered the sum of \$51,400 per year in spousal support, payable to plaintiff on a weekly basis. The sum is modifiable subject to defendant producing a yearly accounting of his gross and net earnings. In the event of an increase in income, plaintiff shall have the right to petition the court for an increase; in the event of a decrease of income, any reduction shall be limited "only to exigent circumstances not created by the defendant."

We review a trial court's factual findings relating to the award of spousal support for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). "If the trial court's findings are not clearly erroneous, this Court must decide whether the disposition ruling was fair and equitable in light of the facts." *Id.* at 655.

MCL 552.23 provides that a trial court has discretion to award spousal support "as it considers just and reasonable" in light of all the circumstances. "Relevant factors for the court to consider 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).

Defendant contends that the trial court erred in awarding permanent spousal support where the marriage effectively ended in 1994, after thirteen years, where plaintiff made no effort to provide for herself since that time, and all real issues in the case other than spousal support had been decided since 1999. We disagree.

Defendant challenges the court's decision to treat the parties as having been married for 19½ years, arguing that the court should have used an earlier date. Defendant argues the trial court failed to note the unrebutted testimony that plaintiff had essentially "kicked" defendant out of the bedroom as of 1994 and that there was no marital relationship after that date. According to defendant, the marriage was effectively over as of 1994, some six years before the date of trial. Defendant further argues that the court found that there had been a breakdown in the marriage when it took proofs on the issue in December, 1999.

In *Byington v Byington*, 224 Mich App 103, 109; 568 NW2d 141 (1997), this Court stated that "[m]arriage is a status that legally terminates only upon the death of a spouse or upon entry of a judgment of divorce," and further observed that there is no de facto divorce and no consensual divorce. *Id* at 110. Here, the trial court relied on the fact that defendant continued to live in the home through the divorce and that a status quo order had been in effect. Under these circumstances, we conclude the trial court's decision to treat this as a 19½-year marriage was not erroneous.

Defendant also contends that the trial court erred in failing to consider that, although the marriage was effectively over in 1994 and declared irretrievably broken in 1999, plaintiff deliberately chose to do nothing to prepare to support herself. The trial court found that while plaintiff has no physical or mental disabilities that could preclude her from working, she has no marketable skills at the present time. On the other hand, the trial court found that defendant has a lucrative dermatology practice and the ability to generate large sums of money.

Plaintiff testified that her job is a homemaker -- to raise the children and nurture the family. When plaintiff and defendant were first married, plaintiff worked as a sales representative for Revlon Cosmetics. However, she quit that job in 1984 when her son was born. Plaintiff testified that in 1995 she took massage training, but has not had a job in this area. Defendant is a dermatologist with his own practice, and also works part-time at the Henry Ford Hospital. Although there was much testimony regarding the decrease in income from defendant's practice, there was expert testimony that with the court-appointed receiver's help, defendant was "back on track" with regard to his practice. There was also testimony from one of the CPAs that defendant's income for 2001 should increase by 10%.

Based on the testimony presented in this case, we conclude that the trial court's findings were not clearly erroneous. We also conclude that based on the income projections for defendant's practice, and plaintiff's lack of marketable skills, the trial court's decision to award permanent spousal support should be affirmed. This case falls in the gray area where, given the length of the marriage and the disparity in work history and income on the one hand, and the good health and relative youth of the dependent spouse on the other hand, trial courts will legitimately struggle with the question whether spousal support should be permanent. Under the circumstances, we are unable to state that the trial court's decision to grant permanent alimony was not fair and equitable. We conclude, however, that the trial court's opinion, which was incorporated into the judgment, is not fair and equitable to the extent that it treats plaintiff's

income and ability to work as irrelevant. While defendant has no marketable skills at present and has been out of the work force for some time, she was 47-years old at the time of divorce and is in good health. As the trial court noted, she should be expected to take measures to re-enter the work force. To the extent that the court tied future modifications in spousal support to defendant's income alone, we find error. Plaintiff's future income and employment efforts are also relevant, and should be considered. We remand for a modification of that portion of the opinion and order.

Defendant also contends that the trial court erred in valuing his practice at \$265,000 as of December 31, 1998, approximately two months after the complaint was filed. Defendant asserts that the court took this action based on the unsubstantiated belief that defendant deliberately reduced his income to spite plaintiff.

The valuation of an asset by the trial court is a finding of fact we will reverse only if found to be clearly erroneous. *Kowalesky v Kowalesky*, 148 Mich App 151, 155; 384 NW2d 112 (1986). "The actual date to be used for valuation of an asset is within the discretion of the trial court." *Burkey v Burkey (On Rehearing)*, 189 Mich App 72, 76-77; 471 NW2d 631 (1991). Further, in *Byington*, *supra* at 114 n 4, this Court stated:

We suggest that, to forestall efforts by any party to use time for economic gamesmanship or leverage in a divorce proceeding, circuit courts utilize their authority under MCR 2.401(B)(1)(b) and 3.210(A)(2) and (3) by scheduling firm valuation and trial dates shortly after the filing of a divorce complaint and by generally holding to the valuation date even if the trial date is postponed.

It was uncontroverted that defendant's income dropped precipitiously in 1999 and 2000. The testimony, however, was conflicting regarding the reasons for defendant's decrease in income in the two years immediately after plaintiff filed the complaint for divorce. The accountants and receiver found no evidence that defendant was removing money from the practice. Rottman, the accounting expert, testified that defendant told him that the reason his practice was getting progressively worse was that he could not get proper help with billing. At trial, defendant attributed the reduction to billing problems and the reduction of the per patient billing reimbursement by managed care. While there was testimony that defendant was working many hours per week, there was also testimony that defendant's staff asserted that at some point defendant sometimes simply chose not to come into the office and meet with patients for "personal reasons." Findling, the receiver, and Dery, the accountant hired by Findling, both indicated that they believed that due to their involvement, defendant's income had increased and the practice was on the "right track." Although the testimony was conflicting regarding the reasons for defendant's drop in income after the divorce was filed, we do not believe that the trial court's finding on this matter was clearly erroneous. The testimony clearly indicated that defendant's income took a precipitous drop after plaintiff filed for divorce, and that he stopped paying income and property taxes at about that time. According to plaintiff's own expert, the value of defendant's practice in December 2000 was \$65,000, while the value was \$144,000 two years earlier, around the time the complaint was filed. "Due regard shall be given to the trial court's superior opportunity and ability to judge the credibility of witnesses." *Sparling Plastic*

*Industries, Inc v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998). We conclude that the trial court did not abuse its discretion in using December 31, 1998 as the date of valuation for defendant's practice.

Affirmed.

/s/ Jane E. Markey  
/s/ Helene N. White  
/s/ Brian K. Zahra