

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTI FORSBERG,

Plaintiff-Appellant,

v

KENNETH FORSBERG,

Defendant-Appellee.

UNPUBLISHED

December 18, 2003

No. 240699

Ingham Circuit Court

LC No. 97-093027-DM

Before: Talbot, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the trial court's order increasing defendant's child support obligation and denying her request for attorney fees, repair of the marital home driveway, and creation of a trust. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

After a lengthy marriage, the parties divorced in 1997. The judgment of divorce provided that defendant would pay \$350 per week in child support for the maintenance of the parties' four minor children who resided with plaintiff.¹ Non-modifiable alimony in gross was also awarded to plaintiff in the amount of \$650 per week for a five-year period. Defendant was awarded all rights, title, and interest in any business entity, free and clear of any claim made by plaintiff. Lastly, the driveway of the marital home² was to be fixed within ninety days of entry of the judgment "if possible," based on the recommendation of a neutral contractor.

Plaintiff filed a motion to increase child support, alleging that defendant's income had substantially increased since the entry of the judgment of divorce. Plaintiff also requested repair of the driveway in accordance with the terms of the divorce judgment, payment of medical expenses, payment of attorney fees, and creation of a trust in favor of the minor children.

¹ The judgment of divorce further provided that this child support amount "shall not" be modifiable for any reason, absent a change in physical custody, for a five-year period. The motion for modification of child support was raised prior to the expiration of this five-year period, however, the parties do not raise this provision as an issue on appeal.

² The marital home, free of encumbrances, was awarded to plaintiff in the judgment of divorce.

Defendant opposed plaintiff's request for relief. Principally, defendant alleged that any increase in income reflected in his tax returns was actually a one-time capital gain from the sale of corporate assets that had been awarded to him in the judgment of divorce. A two-day evidentiary hearing was conducted. After hearing testimony from plaintiff and expert testimony regarding defendant's corporate entities, the trial court³ agreed with defendant, but modified the child support award based on a four-year average of defendant's wages, interest income, and corporation income. The trial court denied all other requests for relief by plaintiff.

Plaintiff first alleges that the trial court erred in refusing to include the capital gain as "income" in determining defendant's child support obligation. We disagree. The decision to modify a child support order rests in the sound discretion of the trial court, and the burden is on the party appealing the order to show a clear abuse of discretion. *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999). While factual findings are reviewed for clear error and the ultimate decision is reviewed de novo, reversal is not appropriate unless this Court is convinced that it would have reached a different result. *Id.* Review of the record reveals that defendant's expert testified that the capital gain, realized because of the sale of a corporate asset, essentially "passed through" because the corporation retained the benefit and merely paid defendant the necessary taxes incurred from the sale. To contradict this assertion, plaintiff and her expert cited to the amount of money and number of transactions in defendant's bank accounts. The trial court concluded that it was inappropriate to include the capital gain because it involved a one-time transaction based on the sale of an asset that defendant was awarded in the judgment of divorce. The trial court increased the child support obligation based on defendant's income, interest income, and corporation income. We cannot conclude that the trial court's factual findings were clearly erroneous, and the increase in the child support obligation, excluding the capital gain, was not an abuse of discretion. *Kosch, supra*.

Plaintiff next alleges that the trial court erred in failing to award attorney fees based on her inability to pay and defendant's unreasonableness. We conclude that remand for consideration of this issue is required. A trial court's decision to award attorney fees is reviewed for an abuse of discretion. *Kosch, supra* at 354. The trial court concluded that defendant's actions in contesting the modification to child support was not unreasonable. The trial court further concluded that plaintiff had the ability to pay after considering plaintiff's income from a trust and her concession that she had the ability to earn \$10,000 to \$13,000 per year based on her associate degrees. We cannot conclude that the trial court's decision in this regard was an abuse of discretion. *Id.*

However, the trial court did not consider whether the request for attorney fees was governed by the terms of the judgment of divorce. Specifically, the judgment of divorce provided that defendant would be responsible for reasonable attorney fees resulting from

³ Although plaintiff's counsel sought to have defendant testify, the trial court concluded that the testimony was unnecessary. The omission of defendant's testimony is not raised on appeal.

nonperformance involving support and health care. The trial court failed to consider whether the payment of attorney fees was required in accordance with the terms of the judgment of divorce. Accordingly, we remand for consideration of this issue.⁴

Plaintiff next alleges that the trial court erred in sua sponte applying the doctrine of laches to preclude enforcement of the provision in the judgment of divorce requiring repair of the driveway. We agree. Review of the judgment of divorce reveals that the parties were to mutually agree to a neutral contractor for repair of the driveway and the repair should occur within ninety days of entry of the judgment, “if possible.” Laches applies where the passage of time coupled with a change in conditions will make it inequitable to enforce a claim, and the lack of diligence on the part of the plaintiff causes prejudice to the defendant. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 494; 608 NW2d 531 (2000).

In the present case, plaintiff testified that she did not consult a neutral contractor because defendant would refuse to agree to anyone that she suggested. Defense counsel represented that defendant would testify that he sent people to fix the driveway. The trial judge declined to hear testimony from defendant regarding this issue, stating “I’m not deciding a driveway issue ...,” and sua sponte concluded that laches applied pursuant to the terms of the judgment of divorce. While the judgment of divorce did contain a timeframe for repair, it did not contain a time is of the essence clause or mandatory language requiring repair within ninety days. Moreover, there was no evidence of a change in conditions or evidence of prejudice to defendant as a result of any delay. Accordingly, the trial court erred in applying the doctrine of laches, and we remand for consideration of this issue.

Plaintiff next alleges that the trial court abused its discretion in failing to establish a “good fortune” trust for the benefit of the minor children. We disagree. We review questions of law de novo and review the trial court’s findings of fact for clear error. *Meredith Corp v City of Flint*, 256 Mich App 703, 711-712; 671 NW2d 101 (2003). “Good fortune” child support occurs where there is a difference between the amount of support set forth in the guidelines and the actual amount necessary to meet the child’s needs. *Boyt v Romanow*, 664 So 2d 995, 996 (Fla Dist Ct App 1995). Specifically, where the actual needs of the child are less than the amount of support awarded pursuant to the guidelines, the excess support may be placed into a trust account for the benefit of the minor child. *Id.* at 996-997. The rationale being that a child is entitled to share in the affluence of a noncustodial support-paying parent. *Id.* at 996. In the present case, the trial court did not conclude that there was a difference between the award of child support⁵

⁴ At the beginning of the evidentiary hearing, defendant agreed to payment of certain medical expenses. However, during the continuation of the evidentiary hearing two months later, it was alleged that there was a return of payment to defendant and that issues remained. The trial court referred this matter to the friend of the court and did not address it. Thus, the trial court did not resolve whether a failure to provide support and health care as set forth in the judgment of divorce occurred that invoked the duty to pay reasonable attorney fees.

⁵ It is important to note that plaintiff did not contest the amount of child support as increased or the calculation of the child support. Rather, the issue raised on appeal addressed whether the sale of the business asset, a capital gain, should be included in the income determination.

and the actual needs of the minor children. Furthermore, the trial court noted at the commencement of the hearing that defendant had agreed to establish education trusts on behalf of the children for a five-year period with deposits of \$10,000 in the judgment of divorce. On this record, we cannot conclude that the trial court's denial of the request for a good fortune trust was clearly erroneous. *Meredith Corp, supra*.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Donald S. Owens

/s/ Karen M. Fort Hood