STATE OF MICHIGAN

COURT OF APPEALS

ANDREA BETH SHARFMAN SWITCH,

Plaintiff-Appellee/Cross-Appellant,

v

JEROME ROBERT SWITCH,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
May 26, 2005

No. 250118
Oakland Circuit Court
LC No. 2001-650376-DM

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

PER CURIAM.

Defendant appeals as of right from a judgment of divorce, challenging the trial court's award of spousal support. Defendant contends that many of the trial court's factual findings are clearly erroneous and that the trial court's ultimate award of lifetime spousal support of $4,000 a month is inequitable. Plaintiff cross appeals, arguing that the trial court erred in requiring her to pay her own attorney fees and expert witness fees. We vacate the portion of the judgment awarding spousal support and remand for reconsideration of an appropriate award in light of this opinion. We affirm the trial court's decision with regard to attorney fees.

An award of spousal support is within the trial court's discretion. *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). On appeal, the trial court's factual findings are reviewed for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). An award of alimony is determined by examining what is just and reasonable under the circumstances of the individual case. *Id*. A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been made. *Id*. at 654-655. If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts. *Id.* at 655. The trial court's decision must be affirmed unless the appellate court is firmly convinced that it was inequitable. *Gates, supra* at 433.

The trial court awarded plaintiff permanent spousal support in the amount of $4,000 a month, subject to modification on motion of either party as to amount or term. Defendant first

argues that an award of spousal support was not warranted under MCL 552.23[1] because plaintiff was awarded assets valued at approximately $900,000. However, defendant places too much emphasis on plaintiff's property award.

In *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995), this Court reversed the trial court's decision not to award the plaintiff alimony because she "had not demonstrated that the amount awarded her was inadequate to support a reasonable standard of living." *Id*. at 295. The plaintiff received a property award of $560,000, but had an annual income of only $27,000 compared with the defendant's annual income of $371,000. *Id*. at 296. This Court in *Hanaway* stated:

> In a situation such as this, where both parties are awarded substantial assets, the court, in evaluating a claim for alimony, should focus on the income-earning potential of the assets and should not evaluate a party' ability to provide self-support by including in the amount available for support the value of the assets themselves. Given the length of the marriage, the magnitude of the marital estate, and defendant's capital position and earning potential after the divorce, plaintiff should not be expected to consume her capital to support herself. [*Id*.]

Thus, the trial court was instructed to consider only the income-producing potential of the assets awarded, instead of the value of the assets themselves. *Id*.

Here, plaintiff's liquid assets totaled $519,326, and plaintiff had debts totaling $292,940. Plaintiff estimated the cost of her monthly expenses at $11,543, or $138,516 a year.[2] Investing her remaining capital, assuming a modest return rate of five percent, would yield only $24,000 per annum. The trial court did not clearly err in determining that plaintiff's assets were insufficient for her suitable maintenance.

Defendant next argues that when plaintiff's employment income, assets, and child support award are considered in light of her overstated needs, spousal support was not warranted under MCL 552.23. Defendant contends that reversal is required in light of *Olson v Olson*, 256

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[1] MCL 522.23 provides, in pertinent part:

> (1) Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage as are committed to the care and custody of either party, the court may further award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

[2] This is the lowest monthly expense total to which plaintiff testified.

Mich App 619, 631; 671 NW2d 64 (2003), and *Hanaway, supra*, because plaintiff is capable of working and making a good income and she received a property award of nearly $900,000, unlike the plaintiffs in *Olson* and *Hanaway*. In *Olson*, the parties were married for twenty-two years, led an affluent lifestyle, the plaintiff received sizeable marital assets, although most were non-income producing, and the defendant's income and earning potential were great, while the plaintiff's was nearly non-existent given her age and her ovarian cancer. *Olson, supra* at 632. The Court reversed the trial court's decision to deny the plaintiff alimony because, following the reasoning in *Hanaway*, "given the parties' lifestyle, defendant's potential income, the length of the marriage, and the magnitude of the marital estate, it would be inequitable to require plaintiff to 'consume her capital to support herself.'" *Id.* at 633. Therefore, the value of plaintiff's total property award is not material.

Also, plaintiff's income and needs are only two of the factors that the trial court considers when deciding the issue of spousal support. The main objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party, and a support award is to be based on what is just and reasonable under the circumstances of the case. *Moore, supra* at 654.

> Among the factors that should be considered 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, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status; and (14) general principles of equity. [*Olson, supra* at 631.]

When a trial court decides whether an award of spousal support is warranted, it must consider all the relevant factors. *Sparks v Sparks*, 440 Mich 141, 158; 485 NW2d 893 (1992). Thus, addressing plaintiff's income and needs without also considering the other factors would be erroneous.[3]

The ages of the parties, the past relations and conduct of the parties, the abilities of the parties to work, contributions of the parties to the joint estate, a party's fault in causing the divorce, and the effect of cohabitation on a party's financial status do not appear to have affected the trial court's decision.[4] With regard to the length of the parties' marriage and the parties'

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[3] Because the trial court's jurisdiction to award spousal support is statutory, *Parrish v Parrish*, 138 Mich App 546, 549, 553; 361 NW2d 366 (1984), and the guiding principles are well-established in case law, we find no merit to defendant's contention that the trial court should have utilized an "alimony prognosticator" and abided by its results.

[4] The trial court noted that both parties were relatively young and about the same age, and that both parties had contributed to the marital estate. With regard to the parties' past conduct and fault, the trial court concluded that both parties contributed to the breakdown of the marriage.
(continued…)

health, the trial court simply noted that the parties had been married for eighteen years and delineated each party's health issues.[5] Thus, it is unclear to what extent these factors weighed in the trial court's decision to award spousal support.

Of the remaining factors, defendant first takes issue with the trial court findings regarding plaintiff's income and needs. Defendant asserts that plaintiff's income was understated and her needs overstated. The trial court found that plaintiff earned an average of $71,100 annually as a veterinarian[6] and also earned approximately $2,000 annually from teaching water aerobics. The trial court also imputed $7,000 in investment income to plaintiff that would be generated if plaintiff invested the nearly $150,000 that the trial court ordered defendant pay plaintiff in order to equalize the property division. With regard to these findings, we find no clear error. However, the trial court failed to consider any investment income from the proceeds of the parties' second home that were awarded to plaintiff. Even if these proceeds were used to pay off plaintiff's debts, there would still remain a sizable amount to invest, which would generate additional annual income. We therefore conclude that the trial court clearly erred in imputing only $80,000 in income to plaintiff.

With regard to plaintiff's needs, the trial court noted that $12,826 was the total plaintiff claimed were her expenses and seemingly accepted this amount for purposes of determining whether spousal support was appropriate. Defendant argues that the trial court clearly erred in accepting plaintiff's overstated monthly expenses without considering that many expenses were unnecessary and some inflated or unsubstantiated.[7] While the trial court did not make specific findings in its opinion with regard to each of plaintiff's expenses, there is sufficient evidence on the record for this Court to determine whether the trial court's acceptance of $12,826 for plaintiff's monthly expenses was clear error.

First, defendant avers that the trial court clearly erred in not subtracting from plaintiff's monthly expense total the costs applicable to the children. In addition to spousal support, defendant was ordered to pay $1,980 a month in child support, which he does not contest. Because the trial court did not impute the child support award to plaintiff's income, it should not have also considered the expenses attributable to the children for purposes of determining an appropriate amount of spousal support. The trial court clearly erred in this regard.

(…continued)

The trial court also determined that the parties were both capable of working and were working in their respective professions. Plaintiff, despite her health issues and doctor's recommendation, had continued to work and led an active life and defendant was still working, albeit on a reduced schedule, despite his addictions. Accordingly, because these factors appear to be of no overall consequence to the trial court's decision, we do not address defendant's correlating arguments wherein he asserts, in essence, that these factors weigh equally.

[5] There is no indication, contrary to defendant's contention on appeal, that the trial court discounted his health issues while elevating the importance of plaintiff's health.

[6] From 1999 - 2001.

[7] Defendant erroneously asserts that the trial court failed to make specific findings of fact regarding plaintiff's needs. The trial court found that plaintiff's needs were as she claimed.

Second, defendant argues that the trial court erred in not reducing plaintiff's monthly expense total in order to reflect plaintiff's willingness to cut extraneous monthly expenses. Plaintiff estimated that she would be able to reduce her monthly expenses by ten percent, eliminating such items as massages, manicures, and monthly trips to the hair salon. Moreover, plaintiff proffered in her findings of fact and conclusions of law that this reduced amount was an accurate reflection of her monthly expenses. The new total is therefore $11,543 a month or $138,516 a year. The trial court made no mention of this in its opinion, which we conclude was clear error.

Third, defendant contends that the trial court should have considered an even lower monthly expense total as a more accurate reflection of plaintiff's actual needs in order to force her to demonstrate fiscal responsibility. However, prior standard of living is one of the factors a trial court should consider. The parties led an affluent lifestyle before the divorce and plaintiff's needs would reflect such, differing significantly from a couple with a combined annual income of $50,000. Plaintiff's needs are but one of several relevant factors the trial court considered that this Court must review in determining if the spousal support award is fair and equitable. *Gates*, *supra*. There is no indication in this case that the trial court used the spousal support award simply to enable plaintiff to maintain a certain lifestyle.

Finally, the remainder of defendant's arguments regarding the propriety of certain expenses is based on a faulty premise; namely, that the trial court should have subtracted expenses that defendant should not have to pay for. The purpose of plaintiff estimating her monthly expenses was to demonstrate her overall needs, given that she was to have sole physical custody of the three minor children. It was the trial court's responsibility to look at those needs, both the nature and the amount, and determine, *in light of all the other circumstances*, whether spousal support was justified. Defendant's attempt to whittle down plaintiff's expense list to the bare minimum that he believed were worthy expenses erroneously discounts the parties' prior standard of living and assumes that an award of spousal support should only be given if plaintiff cannot meet her monthly expenses, regardless of the parties' disparate income, length of the marriage, and other relevant non-economic factors. After reviewing the expenses and the testimony at trial, we conclude that the trial court did not clearly err in accepting these amounts as a reasonable reflection of plaintiff's needs.[8]

Defendant further argues that the trial court did not give appropriate consideration to his needs. We agree. The trial court's opinion is devoid of any discussion of defendant's needs or an associated monthly cost. Defendant had testified at trial that his own monthly expenses were between $5,000 and $6,000, with $2,600 of that being his mortgage payment. The trial court's

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[8] With regard to most of plaintiff's expenses, defendant does not point to any contradictory evidence. Defendant does argue on appeal that the homeowners' insurance and car-related expenses were overstated. However, defendant's contention is without merit. At trial, defendant testified that the family car payment was $600 and plaintiff listed the expense at $660, a nominal difference. There was no testimony regarding car repair costs. And defendant states on appeal that $1,800 for homeowners' insurance should be reduced to $800, but plaintiff's list of monthly expenses attributed a monthly cost of only $150 to this expense.

decision to award spousal support despite failing to make any findings of defendant's needs constitutes an abuse of discretion requiring reversal. *Olson, supra* at 633-634. Therefore, we vacate that portion of the trial court's judgment pertaining to spousal support.

We decline to address defendant's arguments concerning whether the trial court's award of spousal support is fair and equitable in light of our conclusion that the trial court made several clearly erroneous findings of fact. *Moore, supra* at 655 (this Court only engages in such an analysis if the Court determines that the trial court's findings of fact were not clearly erroneous.) On remand, we instruct the trial court to revisit the issue of spousal support in light of the errors discussed in this opinion and to further determine the appropriate amount and duration of an award, if any.

Next, we address plaintiff's issue on cross appeal regarding the trial court's decision to deny her motion for attorney fees. This Court reviews a trial court's decision on a motion for attorney fees for an abuse of discretion. *Olson, supra* at 634. Factual findings are reviewed for clear error. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005).

In domestic relations cases, attorney fees are authorized by both statute, MCL 552.13, and court rule, MCR 3.206(C). However, there is no right to the recovery of attorney fees in a divorce action. *Kurz v Kurz*, 178 Mich App 284, 297; 443 NW2d 782 (1989). They may be awarded when a party needs financial assistance to prosecute or defend the action.[9] *Gates, supra* at 438. We find no basis to disturb the trial court's ruling.

Plaintiff argues that the trial court's decision is logically inconsistent with its decision to award spousal support, in which it implicitly determined that her income was insufficient to meet the needs of herself and the children, even after imputing to her income from child support and investing defendant's property equalization payment. But as we previously noted, the trial court made no mention of imputing the award of child support as income to plaintiff. Further, the trial court did not consider the income-earning potential of investing any portion of the proceeds of the sale of the parties' second home, which were awarded to plaintiff.

Plaintiff's reliance on *Kurz, supra*, and *Hanaway, supra*, is misplaced. In *Kurz*, the Court stated:

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[9] A party may also be required to pay another party's attorney fees where that party's misconduct is responsible for incurring those legal fees. MCR 3.206(C)(2); *Grace v Grace*, 253 Mich App 357, 371; 655 NW2d 595 (2002). Although plaintiff argued below that defendant's conduct was the sole reason this case proceeded to trial, on appeal she does not present a meaningful argument regarding this basis. Therefore, we consider the argument abandoned. *Reed, supra* at 163.

Also, we note that defendant asserts that because neither party prevailed in the divorce action, it is proper for neither party to be awarded attorney fees, relying on *Petition of Earle*, 355 Mich 596; 95 NW2d 833 (1959). But that case dealt with an award of costs, not attorney fees, after affirmance of the trial court's ruling, and thus, is not the proper litmus test for recovery of attorney fees

> And, while we recognize that defendant was awarded alimony and a substantial portion of the marital property, much of the value of those awards appears to be either uncollectible at this time or not subject to ready liquidation. Also, the awards were meant to provide defendant with a means of support. Under the circumstances of this case, she should not be forced to invade those awards in order to pay her attorney fees and costs. [*Kurz, supra* at 298.]

Kurz is distinguishable because, unlike plaintiff here, the defendant had no income of her own other than what was awarded to her by the trial court, and did not have sizable liquid assets as does plaintiff here. In this case, plaintiff had other significant sources of income apart from the assets she was awarded.

Likewise, in *Hanaway*, the plaintiff had sizable attorney fees, most her awarded assets were not liquid, she earned only $27,000 a year, and she was not awarded alimony. *Id*. at 296, 299. This Court in *Hanaway* held that the plaintiff could not be expected to pay for her considerable attorney fees out of her $27,000 salary and that she should not be required to invade her principal to pay for the fees. *Id*. at 299. Here, the trial court imputed $80,000 of income to plaintiff annually, not including child support and before it awarded spousal support, and plaintiff had sizable liquid assets with which to pay her debts without having to invade her principals. The trial court did not abuse its discretion in denying plaintiff's request for attorney fees. *Olson, supra*.

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

/s/ Janet T. Neff
/s/ Donald S. Owens
/s/ Karen M. Fort Hood