STATE OF MICHIGAN

COURT OF APPEALS

SHERRY ANN SCHENK,

Plaintiff-Appellant,

v

KEITH ARLAN SCHENK,

Defendant-Appellee.

UNPUBLISHED
December 28, 2006

No. 264074
Kent Circuit Court
LC No. 04-004528-DO

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Plaintiff appeals by right from a divorce judgment which awarded her nominal spousal support for three years. We reverse the award of spousal support and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Basic Facts and Procedural History

Plaintiff and defendant were married in October 1974, and had two adult children. Initially, plaintiff did not work outside the home; however, after the birth of the second child in 1977, plaintiff worked in retail stores and at a bank until health problems forced her to stop working in March 1995. The parties separated in early 1996, and plaintiff filed for divorce in September 1996. The suit terminated by stipulation in December 1998, but the parties continued to live apart. In 2004, plaintiff again filed for divorce.

At trial, plaintiff testified that she had numerous health problems, including depression, anxiety, irritable bowel syndrome, and fibromyalgia, and that she took several prescription medicines. Her prescriptions and much of her medical treatment were covered by defendant's medical insurance at his workplace. Plaintiff paid approximately $200 per month in prescription co-payments. Plaintiff indicated that private medical insurance would cost $356 per month, and would not cover any preexisting conditions. Necessary prescriptions would cost more than $1500 per month without insurance.

While the parties' first divorce action was pending, defendant paid $150 per week as spousal support, pursuant to a court order, between July 1977 and December 1998. Thereafter, defendant voluntarily paid plaintiff $150 per week until April 2004. During the pendency of the second divorce action, defendant paid $200 per week as support, again by court order.

Plaintiff said that she needed just less than $1,700 per month to support herself. She received $456 per month from Social Security disability, $200 per week in support from defendant, and $10 per month in food stamps. Her total monthly income, at age 50, was approximately $1360. Plaintiff had no savings or investments, and had to borrow money from her parents on occasion.

Defendant said that he had paid plaintiff $150 per week until early in 2004. He borrowed $16,000 to pay plaintiff's accumulated medical bills, and repaid that loan in full. He testified that he was employed as a collision estimator in a body shop. His monthly net pay was $2,623. Defendant related that he needed just over $1,800 per month to sustain himself. His 2003 federal income tax return showed income of $44,658. Defendant had neither savings nor investments.

Defendant did not question plaintiff's medical condition. A letter from a physician stated that plaintiff "has been totally unable to participate in a consistent work setting," and that she "is currently totally disabled and dependent upon disability support for her living and medical needs."

The trial court found that both parties had testified honestly and that neither party was at fault for the termination of the marriage. Plaintiff's health forced her to stop working. The trial court specifically found that the marriage lasted for 30 years.

The trial court found that defendant had the higher wage earning potential, and that his current salary was approximately $45,000 per year. Plaintiff received Social Security disability in a "nominal" amount of $450 per month. Defendant had a stable job with a modest salary, and had the ability to pay spousal support.

The trial court found that the parties' living conditions were "comparable, except that the plaintiff "works on her medical conditions through voluminous appointments and medications that are–that are taken on a daily basis." The trial court listed plaintiff's proven medical conditions. It commented on the letter written by plaintiff's physician, but focused only on parts of two sentences that indicated that some anatomic and endoscopic studied "have been normal," and that there had been an effort to seek psychiatric and psychological assistance for plaintiff.

From this, the trial court concluded that "….the need for psychiatric and psychological intervention leads me to believe that the depression and anxiety disorder have escalated the health conditions, which may lead to increased anxiety and depression, and that there has been a vicious cycle of medical concern borne from psychiatric and psychological problems." The trial court acknowledged that the physician was of the opinion that plaintiff was "disabled and dependent."

The trial court found that defendant had voluntarily paid spousal support and had repaid loans that were taken out for plaintiff's medical expenses. Defendant's medical insurance was also a considerable benefit to plaintiff. The trial court concluded that a "significant" award of spousal support had already been made, and that plaintiff had a need to "reorient herself to a future without medical insurance and without ongoing spousal support."

The trial court awarded plaintiff spousal support for a period of three years. Defendant was to pay spousal support at the rate of $400 per month for the first year following the entry of judgment, $300 per month for the second year, and $200 per month for the final year.

In an "edited" opinion, issued after this appeal had been filed, the trial court added:

> "Further, Ms. Schenk has apparently made a career out of more and more conditions that are not supported by medical tests. For example, Ms. Schenk recites that she cannot eat, but her physical appearance is robust. Perhaps if Ms. Schenk had less funding for her medical complaints, she might finds herself less ill."

II. Analysis

An award of spousal support is in the trial court's discretion. *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). The principal objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party. Spousal support is to be based on what is just and reasonable under the circumstances of the case. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). 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 spousal support; (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 v Olson*, 256 Mich App 619, 631; 671 NW2d (2003).

We review the trial court's findings of fact for clear error. *Moore*, *supra*. The findings are presumptively correct, and the appellant bears the burden of showing error. A finding is clearly erroneous if, after viewing all the evidence, we are left with a firm and definite conviction that a mistake was made. *Id*. at 654-655. If the trial court's findings are not clearly erroneous, we must then determine whether the dispositional ruling was fair and equitable in light of all the facts. *Id*. at 655. The trial court's decision regarding spousal support must be affirmed unless we are firmly convinced that it was inequitable. *Gates*, *supra* at 433.

Plaintiff first argues the trial court erred in finding the spousal support payments made by defendant when the parties were separated were "voluntary". We agree. The record showed that between July 1997 and December 1998, defendant's payments of $150 per week were made pursuant to a court order. No evidence supported any other finding of fact.

Plaintiff also argues that it was clear error for the trial court to find in it's "edited opinion" that plaintiff's medical conditions were not genuine, and that plaintiff was malingering.[1] We agree.

As found by the trial court in its original opinion, plaintiff testified "openly, honestly, and responsibly" about her illnesses and the fact that she was receiving psychiatric care and taking prescription medications for depression and anxiety. Indeed, defendant acknowledged that pain forced plaintiff to quit working in 1995. A letter from plaintiff's physician, long familiar with her treatment, concluded that plaintiff was disabled and that, barring a medical breakthrough, she would remain so. It is uncontested that plaintiff qualified for Social Security disability, and that she was reevaluated more than once, following her initial qualification, in order to receive continuing benefits.

The physician's letter mentions, almost in passing, that some diagnostic tests had been "normal," and that there was some psychiatric/psychological component to plaintiff's disability. No evidence supported any other conclusion than that plaintiff was totally disabled. Nor did any evidence support a conclusion that plaintiff would suddenly recover if all support and/or medical insurance was withdrawn. Plaintiff's unrebutted testimony was that she suffered from a number of physical problems. Her testimony was amply supported by the bulk of the physician's letter.

Moreover, the finding, in the "edited" findings of fact, misstated plaintiff's testimony regarding her diet. Plaintiff never testified that she "cannot eat," as the trial court added in its "edited" findings, rather, plaintiff testified that, except for a small amount of food, she ate only a liquid diet. Plaintiff's "robust" appearance was irrelevant, based on her testimony. The trial court clearly erred by finding that plaintiff's illness was imagined. Nor did the evidence support the conclusion in the trial court's "edited" findings that she was a malingerer.

Finally, plaintiff asserts that the spousal support award is inequitable. We agree.

In its findings of fact, the trial court recognized that plaintiff had serious health problems and that she was taking prescription medicines for those conditions. Without contradiction, plaintiff testified to her needs and the monthly cost of those needs. It is clear from this testimony that plaintiff's financial needs were not being met at the time of trial. Even with the spousal support payments defendant was making at the trial, plaintiff was supported, in part, by money that she was forced to borrow from her parents. On this record, we conclude that the award of spousal support was inequitable.

As a final matter, although not raised in her statement of questions presented, plaintiff, in her request for relief, asks that any remand of this matter be ordered before a different judge. The general concern when deciding whether to remand to a different trial judge is whether the

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[1] We note that at trial, defendant never questioned plaintiff's veracity concerning her illness and inability to work. Instead, defendant asserted that because the parties had ceased living together in 1996, his "voluntary" payments to plaintiff were sufficient to end his duty to pay any future support.

appearance of justice will be better served if another judge presides over the case. *Sparks v Sparks*, 440 Mich 141, 163; 485 NW2d 893 (1992) (citations omitted). This Court may choose to remand a case to a different lower court judge if the record indicates that the original judge would have difficulty putting previously expressed views or findings out of mind. *Feaheny v Caldwell*, 175 Mich App 291, 309-310; 437 NW2d 358 (1989). For the reasons that follow, we decline to remand this matter to a different judge.

A party challenging the impartiality of a judge must overcome a heavy presumption of judicial impartiality. *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003). "In general, the challenger must prove a judge harbors actual bias or prejudice for or against a party or attorney that is both personal and extrajudicial." *Id*. (citations omitted). However, that a judge repeatedly rules against a litigant, even if those rulings are erroneous, does not establish disqualification based on bias or prejudice. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597-598; 640 NW2d 321 (2001). Critical or hostile remarks made by a trial court judge to counsel or the parties also do not, as a general matter, establish disqualifying bias. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996).

Here, the trial judge appeared to be strongly of the opinion that the plaintiff's numerous health issues were not genuine. However, the mere fact that the trial judge held such as opinion does not establish that she will be unable to set aside that inclination and fairly decide this case on remand. Although the trial court has made more than one erroneous ruling in this case, and such rulings went against plaintiff, rulings against a litigant, even if those rulings are erroneous, do not establish disqualification based on bias or prejudice. *Armstrong*, *supra* at 597-598. A review of the transcript in this case does not reveal any actual personal prejudice or bias on the part of the trial court and further, nothing in the record supports a finding that the trial court could not put aside its previous rulings.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly