

STATE OF MICHIGAN
COURT OF APPEALS

KRISTINE KAY FITZGERALD,

Plaintiff-Appellee,

v

TIMOTHY R. FITZGERALD,

Defendant-Appellant.

UNPUBLISHED
February 12, 2009

No. 282348
Isabella Circuit Court
LC No. 06-005107-DM

Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

In this divorce action, defendant appeals as of right the parties' judgment of divorce. We affirm.

Defendant first argues that the trial court erred in awarding plaintiff \$125 per month in spousal support for a two-year period. Defendant argues that the payment would impoverish him and was not fair and equitable under the totality of the circumstances. Defendant contends that while he does not dispute having \$35,000 in annual income attributed to him for purposes of calculating child support, he "is not aware of law which would allow income to be attributed for spousal support purposes." The parties had settled the issues concerning custody, parenting time, and child support.

We review a trial court's award of spousal support for an abuse of discretion. *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003). An abuse of discretion occurs where the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). We review a trial court's findings of fact relating to an award of spousal support for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). The trial court's findings are presumed to be correct and the challenging party bears the burden of showing clear error. *Olson, supra* at 629. "A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made." *Moore, supra* at 654-655. If there is no clear error with respect to the factual findings, this Court must then determine whether the dispositional ruling was fair and equitable in light of the facts. *Id.*

"The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party, and alimony is to be based on what is just and

reasonable under the circumstances of the case.” *Olson, supra* at 631. Factors to be considered include the following:

(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. [*Id.*]

The trial court analyzed these factors and noted its belief that defendant had "the capability and the potential to earn more than he [was] currently earning."

The record indicates that the parties were married for over 11 years and had two children, that plaintiff remained at home to raise the children for the greater part of the marriage, that plaintiff has a high school diploma, whereas defendant has a college degree, that plaintiff was working, temporarily, as a contract receptionist at the time of trial, earning \$8.50 per hour, and that defendant was working as a college faculty instructor in photojournalism, making \$6,750 per semester. The record also reveals that defendant earned \$66,600 in 2003, \$82,400 in 2004, and \$58,000 in 2005, operating two professional photography businesses before they failed. Defendant also made \$20,000 in 2006 doing photography work and continues to work on photography projects. Further, defense counsel represented to the court his belief that defendant was not paying rent under his current housing situation. Taking these facts into consideration, along with other evidence on the record concerning the plight of the parties, we cannot conclude that the trial court erred in awarding plaintiff modest rehabilitative and temporary spousal support in the amount of \$125 per month for a two-year period. Although the parties are both suffering economically, the award is fair and equitable under the totality of the circumstances. Assuming that the trial court was attributing or imputing income to defendant in some fashion, the spousal support factors recited above speak of the *ability* to work and to pay, and evidently the court was of the opinion that defendant had the ability and capacity to earn more. The credibility of defendant's testimony regarding his economic situation and his earning capacity was for the trial court to judge, not this Court. MCR 2.613(C). And \$35,000 in annual income was attributed to defendant for purposes of child support, with which he has no qualms, and there is indeed authority to also impute income to a party for purposes of spousal support. *Moore, supra* at 655 (“If a court finds that a party has voluntarily reduced the party’s income, the court may impute additional income in order to arrive at an appropriate alimony award.”). Defendant had a history of significantly higher earnings and, given his education and skills, the trial court’s conclusion that defendant was capable of earning more than he was currently making was not clearly erroneous.

We conclude that the record reflects that the trial court considered the appropriate factors and that its findings of fact as to those factors were not clearly erroneous. Accordingly, the trial court did not abuse its discretion in awarding plaintiff temporary rehabilitative spousal support.

Defendant next argues that the trial court erred in valuing his camera and camera equipment at \$8,000 and ordering him to pay plaintiff \$4,000 as her share of the equipment, which was awarded to defendant. Defendant maintains that the actual value of the equipment was \$2,600, as represented to the bankruptcy court in his bankruptcy filing. Plaintiff claimed that the equipment was worth \$62,000 or more. Defendant provides no references to the trial record that support his position.¹ In any event, the valuation of the assets was within a range established by the proofs, and we thus find no clear error. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). The record does not reflect that the property division was unfair or unjust.

Affirmed.

/s/ Jane E. Markey

/s/ William B. Murphy

/s/ Stephen L. Borrello

¹ The trial court stated that the value "could be set anywhere from about seventy-eight hundred to sixty-two thousand [dollars] based on the estimates of the parties," although it found plaintiff's numbers to be inflated. It is also noted that the court's valuation apparently encompassed not only the camera and camera equipment but all of the business equipment.