STATE OF MICHIGAN

COURT OF APPEALS

DONNA V. CESNICK,

Plaintiff-Appellee,

v

FRANK J. CESNICK,

Defendant-Appellant.

UNPUBLISHED
April 14, 2009

No. 282715
Livingston Circuit Court
LC No. 07-003508-DO

Before: Saad, C.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

In this divorce action, defendant appeals by right the December 5, 2007 default judgment of divorce, which ordered him to pay $1,756 per month in spousal support and to pay the costs of plaintiff's COBRA[1] coverage. Because the trial court made its award of spousal support and payment of plaintiff's COBRA coverage after hearing the parties' testimony and arguments and because we are not firmly convinced that the trial court's award was inequitable, we affirm.

Defendant first argues that, because he was not personally ordered to appear at the conferences and because his counsel attended the conferences on his behalf, the trial court erred in entering a judgment by default against him based on his nonappearance at pretrial conferences. A trial court's decision to enter a default is reviewed for an abuse of discretion. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). The construction and application of court rules present questions of law that are reviewed de novo. *Id.*

> When construction of a court rule is required, the legal principles that govern the construction and application of statutes are utilized. . . . The primary goal of statutory interpretation is to give effect to the intent of the Legislature. This determination is accomplished by examining the plain language of the statute. Although a statute may contain separate provisions, it should be read as a consistent whole, if possible, with effect given to each provision. If the statutory language is unambiguous, appellate courts presume that the Legislature intended the meaning plainly expressed and further judicial construction is neither

[1] Consolidated Omnibus Budget Reconciliation Act, 29 USC 1161 *et seq.*

> permitted nor required. Statutory language should be reasonably construed, keeping in mind the purpose of the statute. If reasonable minds could differ regarding the meaning of a statute, judicial construction is appropriate. When construing a statute, a court must look at the object of the statute in light of the harm it is designed to remedy and apply a reasonable construction that will best accomplish the purpose of the Legislature. [*Id*. at 526-527 (citations omitted).]

MCR 2.401, which relates to pretrial procedures, conferences, and scheduling orders, provides, in pertinent part:

> (A) **Time; Discretion of Court.** At any time after the commencement of the action, on its own initiative or the request of a party, the court may direct that the attorneys for the parties, alone or with the parties, appear for a conference. . . .
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> * * *
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> (F) **Presence of Parties at Conference.** If the court anticipates meaningful discussion of settlement, the court may direct that the parties to the action, agents of parties, representatives of lienholders, representatives of insurance carriers, or other persons:
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> (1) be present at the conference or be immediately available at the time of the conference[.]
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> * * *
>
> (G) **Failure to Attend or to Participate.**
>
> (1) Failure of a party or the party's attorney or other representative to attend a scheduled conference or to have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement, as directed by the court, may constitute a default to which MCR 2.603 is applicable or a ground for dismissal under MCR 2.504(B).

In addition, MCR 2.506(F)(6) provides that if a party fails to attend a court proceeding, pursuant to an order to attend, a trial court may enter a judgment by default against the party.

These court rules are unambiguous. The plain language of MCR 2.401 and MCR 2.506(F)(6), when read as a consistent whole, clearly indicates that a trial court can require a party's presence at a hearing, and that the trial court can enter a judgment by default against the party when the party, who has been ordered to appear, fails to appear.

Regardless, and assuming for purposes of this appeal that the trial court erred in granting plaintiff a judgment of divorce by default,[2] defendant fails to present any argument that he was

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[2] We do note that, at the November 13, 2007 hearing, at which defendant did not appear, (continued…)

prejudiced by the error. MCR 2.613(A). At the December 5, 2007 hearing, defendant presented to the trial court his objections to plaintiff's proposed default judgment of divorce. While the parties agreed on several modifications to the judgment at the hearing, there were several issues on which the parties could not agree, such as the amount of spousal support and the amount that plaintiff was to receive from defendant's 401(k). However, the trial court issued rulings on the contested issues after hearing the parties' testimony and their arguments. Thus, even if the trial court erred in granting a divorce judgment by default, we see no reason to set aside the judgment. The provisions in the judgment of divorce were either agreed to by defendant, at the December 5, 2007 hearing or at mediation, or ordered by the trial court after hearing the parties' testimony.

Indeed, it is apparent that defendant's only objection to the proceedings below is that the trial court awarded spousal support in the amount stated in plaintiff's proposed default judgment of divorce. Defendant does not assert that he did not want a divorce. As to the issue of spousal support, defendant and his counsel were permitted to contest the amount at the December 5, 2007 hearing. Testimony was taken from the parties, and the trial court made findings of fact and rendered a decision. Thus, having suffered no prejudice by the entry of a divorce judgment by default, defendant's claim that the divorce judgment must be set aside because an error occurred in the entry of the default is unavailing.

However, we will consider defendant's appeal as an appeal of the trial court's award of spousal support. In this regard, defendant argues that the trial court erred when it ordered him to pay $1,756 per month in spousal support, an amount that was calculated on his preretirement income rather than on his postretirement income, and to pay plaintiff's COBRA coverage for health insurance. We disagree.

The award of spousal support is in the trial court's discretion. *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336 (2008). We review the trial court's factual findings for clear error. *Thornton v Thornton*, 277 Mich App 453, 458; 746 NW2d 627 (2007). "The findings are presumptively correct, and the burden is on the appellant to show clear error." *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). If the trial court's findings are not clearly erroneous, we must then decide whether the dispositional ruling was fair and equitable in light of the facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). The trial court's decision as to spousal support must be affirmed unless we are firmly convinced that it was inequitable. *Id*. at 152; *Berger*, *supra* at 727.

The objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party. *Berger, supra* at 726. An award is to be based on what is just and reasonable under the circumstances of the case. *Id*. 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,

(…continued)

defendant's counsel admitted that at the last hearing the trial court informed him that defendant was to be in court for the hearing.

> (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*. at 726-727 (quotation omitted).]

"The voluntary reduction of income may [also] be considered in determining the proper amount of alimony." *Moore v Moore*, 242 Mich App 652, 655; 619 NW2d 723 (2000). "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." *Id*. A trial court may also consider overtime income earned when determining an award of alimony. See *Wright v Wright*, 279 Mich App 291, 305, 307-308; 761 NW2d 443 (2008).

The proofs presented to the trial court established that defendant, at the age of 56, voluntarily chose to retire from Ford Motor Company with a buyout of $35,000 in June 2007. Defendant, because of his seniority, would have had the first opportunity to get transferred to another plant and would have been the last to be laid off. While he worked at Ford, defendant earned $85,000 to $100,000 per year, which included overtime pay.[3] At his new job, defendant earned $25,000 per year. In addition, defendant admitted that, although the December 2005 consent judgment of separate maintenance provided that he was to make the mortgage payments on the parties' two properties and continue paying off the balances on the credit cards, he never made any mortgage payments and only made the credit card payments for five or six months.

With regard to plaintiff, the proofs established that, at the time of hearing, she was 56 years old. Plaintiff worked throughout much of her life, but because of her health, she was not currently able to work. She had undergone approximately eight surgeries in the previous years. Plaintiff received $541 per month in social security income. These payments were plaintiff's only source of income, other than an additional $25 per month that she received from the state for food. She was also being evicted from her home because of defendant's failure to make the mortgage payments.

The trial court ordered defendant to pay $1,756 per month in spousal support and to maintain health coverage for plaintiff through COBRA. In making this award, the trial court found that plaintiff had a series of illnesses and was unable to work. Regarding defendant, the trial court found that he voluntarily retired from Ford and, thereafter, moved to Wisconsin to live with his girlfriend. The trial court also stated that defendant had "never paid a nickel" to plaintiff. Based on the proofs presented, the trial court's findings were not clearly erroneous. *Thornton, supra*. In addition, the trial court did not abuse its discretion in imputing income to defendant. *Moore, supra*. After the consent judgment of separate maintenance had been entered, defendant, at the age of 56, voluntarily retired from a job where he had earned between $85,000

[3] Without overtime pay, defendant earned approximately $54,000 per year.

to $100,000 per year, at a time when it does not appear that he was in jeopardy of losing his employment. Defendant then obtained employment where he earned $25,000 per year.

We conclude that the trial court's award of spousal support was fair and equitable in light of the facts of the case. *Sparks, supra*. The parties divorced after what was tantamount to an 18-year marriage. Plaintiff was not able to work because of her health, and she received less than $600 per month in income. In addition, because defendant failed to make the mortgage payments on their homes, plaintiff was in the process of being evicted from her home. Based on the foregoing, we are not firmly convinced that the trial court's award of spousal support, or the fact that the alimony was ordered in addition to defendant paying for plaintiff's COBRA coverage, was inequitable. *Berger*, *supra*. It appears that the award of spousal support balances the incomes of the parties, and defendant has not shown that the trial court's award will impoverish him.[4] *Id*. Accordingly, we affirm the trial court's decision regarding spousal support and payment of plaintiff's COBRA coverage.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

[4] Although defendant claimed that plaintiff's COBRA coverage would cost $900 a month, defendant presented no evidence to the trial court to establish the amount.