

STATE OF MICHIGAN
COURT OF APPEALS

DAVID R. FREYER,

Plaintiff-Appellant,

v

MARY J. FREYER,

Defendant-Appellee.

UNPUBLISHED

February 24, 2011

No. 292765

Kent Circuit Court

LC No. 06-001676-DM

Before: STEPHENS, P.J., and MARKEY and WILDER, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's award of continued spousal support for defendant, which increased her spousal support from \$3,545 per month for two years per the terms of the parties' confidential divorce settlement agreement to \$6,000 per month until she reached 70 years of age. We affirm.

Plaintiff challenges the trial court's award of ongoing spousal support at a monthly rate greatly in excess of the rate agreed upon in the parties' confidential divorce settlement agreement. Plaintiff claims that the parties sought to limit spousal support to two years under the terms of their agreement, and that defendant failed to demonstrate the requisite change-in-circumstances to modify spousal support. We disagree in both cases.

The parties' agreement contained provisions related to spousal support for defendant. Such an agreement is subject to our principles of contract interpretation. See *Thornton v Thornton*, 277 Mich App 453, 456; 746 NW2d 627 (2007). The proper interpretation of a divorce judgment and its associated contracts raise questions of law, which are subject to de novo review. *Holmes v Holmes*, 281 Mich App 575, 587; 760 NW2d 300 (2008); *Thornton*, 277 Mich App at 456. "The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007).

The parties' agreement contained the following relevant spousal support provisions:

- a) Effective September 15, 2006, Plaintiff husband shall pay in advance as spousal support directly to an account designated by the Defendant wife the sum of \$3,545 per month (\$1,636 every two week paycheck) for 24 months. The

prognosticator used to calculate this amount is attached hereto and incorporated into this agreement. Plaintiff husband shall effectuate a private income withholding order with his employer which will result in the direct deposit of funds into an account designated by Defendant wife. As and for additional spousal support, Plaintiff husband shall pay directly to Defendant wife 20% of any gross bonus over and above his current base salary of \$233,000 per year.

b) The question of additional spousal support shall be reserved until September 1, 2008, or until the further order of the Court. Spousal support will terminate upon the earlier of the death of either party, Defendant's remarriage or co-habitation with an unrelated male, or until further order of the Court.

The first paragraph sets forth the conditions for plaintiff's spousal support payments to defendant effective September 15, 2006, whereby he agreed to pay her \$3,545 per month for 24 months. The second paragraph provides for spousal support following the initial 24-month period: "The question of additional spousal support shall be reserved until September 1, 2008, or until the further order of the Court." That paragraph also expressly designates when spousal support will terminate: "upon the earlier of the death of either party, Defendant's remarriage or co-habitation with an unrelated male, or until further order of the Court." We conclude that under the plain terms of the agreement, the parties agreed the issue of spousal support could be revisited on or before September 1, 2008. See *McCarthy v McCarthy*, 192 Mich App 279, 281-283; 480 NW2d 617 (1991). The trial court correctly discerned the parties' intent to revisit the issue of spousal support per their agreement, *Dobbelaere*, 275 Mich App at 529, and correctly ruled changed circumstances were not required to do so, *McCarthy*, 192 Mich App at 283-284.

Next, plaintiff challenges the trial court's findings regarding the spousal support factors and contends that the amount and duration of spousal support are inequitable. A trial court has discretion to grant spousal support. *Korth v Korth*, 256 Mich App 286, 288; 662 NW2d 111 (2003). We review a trial court's factual findings concerning spousal support for clear error. *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). "The findings are presumptively correct, and the burden is on the appellant to show clear error." *Id.* A finding is clearly erroneous if, after a review of the entire record, we are left with the definite and firm conviction that a mistake was made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). We review the trial court's ultimate decision regarding spousal support for an abuse of discretion. *Gates*, 256 Mich App at 432. The trial court's decision must be affirmed unless we are firmly convinced that it was inequitable. *Id.* at 433.

"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 v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003). In awarding spousal support, a trial court should consider: (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) the 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.*

In this case, the trial court appropriately considered the spousal support factors and any facts presented at the October 15, 2008 evidentiary hearing that were suitable to a particular factor. See *McCarthy*, 192 Mich App at 283-284. The trial court ultimately found that spousal support in the amount of \$6,000 per month until defendant reached 70 years of age was appropriate based on plaintiff's fault in causing the breakdown of the marriage, the needs of the parties, and the wide disparity of income and earning potential of the parties. After review of the entire record, we are not left with the definite and firm conviction that a mistake was made with respect to any of the trial court's essential findings. *Beason*, 435 Mich at 805.

Turning to the record, defendant is presently 59 years old, and seven years older than plaintiff. The parties were married for 18 years, separating in December 2005 when defendant learned of plaintiff's relationship with a 23-year-old medical student. After moving out of the marital residence, plaintiff spent three or four nights at the medical student's residence before taking up residence at the parties' cottage. In December 2007, plaintiff left his position with Spectrum Health in Grand Rapids for a position in California, where he presently earns an annual salary of \$230,000 per year (an amount somewhat less than he earned in Grand Rapids). There was limited testimony regarding plaintiff's monthly expenses, other than rent, a monthly stipend for the parties' two college-aged daughters, and his retirement contribution. The daughters' education is funded through a trust established pursuant to the parties' agreement.

Defendant is a pediatric nurse practitioner, although she was essentially a stay-at-mother during much of the parties' marriage. From 1990 to December 2007, defendant worked one day per week at Spectrum Health. In December 2007, she was able to increase her hours to 36 hours per week while another staff member was on maternity leave. In April 2008, her hours were reduced to 30 hours per week, as she covered staffing shortages due to physician vacancies. Defendant's supervisor did not know how long defendant would be able to work these additional hours. It appeared very likely that defendant would eventually return to her one day per week schedule. There was testimony that defendant's employment opportunities are limited because nurse practitioner's must now possess a masters' degree, which defendant does not have. Further, defendant's employment opportunities may be limited by health problems, notably degenerative arthritis in both knees. While defendant received arthroscopic surgery in both knees in 2007, her physician testified that that procedure did not ameliorate a concurrent arthritic condition in both of her knees. She presently receives cortisone shots every few months to alleviate her knee pain. Defendant's physician opined that defendant may need knee replacement surgery for both knees in five to seven years. We find it reasonable that defendant's age and knees will eventually hinder her as a nurse practitioner in discharging her duties. In assessing defendant's need for spousal support, we note that the trial court could have performed a more precise assessment of defendant's income and expenses; however, our review of the record demonstrates that the spousal support award of \$6,000 when combined with her income permit defendant to meet her expenses. The sole record evidence of defendant's earnings is the summary of her pay stubs, covering 64 pay periods from December 31, 2005 to July 12, 2008. Once defendant returns to working one day per week, or 18 hours per period, we discern that she would earn approximately \$1,500 per month (assuming 26 pay periods for 2007, and dividing that figure by 12 months). Defendant's expenses for 2007 were approximately \$7,000 per month, approximately half of which were for the maintenance of the marital residence. Those expenses do not account for any extensive maintenance projects for the more than 100-year-old historic home.

In light of these facts, we are not firmly convinced that the court's award of spousal support was inequitable and conclude the trial court did not abuse its discretion given plaintiff's fault, defendant's tenuous employment, defendant's declining health, defendant's age, and the costs associated with maintaining defendant's residence. *Gates*, 256 Mich App at 432-433. The trial court's spousal support award of \$6,000 per month until defendant reaches 70 years of age balances the incomes and needs of the parties in a way that will not impoverish either; it is based on what was just and reasonable under the circumstances of the case. *Olson*, 256 Mich App at 631. This spousal support award runs until plaintiff becomes 62 years old. There is no indication that he will not be in his present position or a similar one at that time. Without the additional spousal support, defendant will be unable to meet her monthly expenses if and when her hours are reduced to 18 hours per pay period. See *Magee v Magee*, 218 Mich App 158, 163-164; 553 NW2d 363 (1996). Thus, the trial court's award of spousal support in this case was not an abuse of discretion as it was within the range reasonable and principled outcomes. *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007).

We affirm. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Cynthia Diane Stephens
/s/ Jane E. Markey
/s/ Kurtis T. Wilder