STATE OF MICHIGAN

COURT OF APPEALS

KATIE MICHELE CONLEY-WATSON,

Plaintiff-Appellant,

v

MARK DOUGLAS WATSON,

Defendant-Appellee.

UNPUBLISHED
February 23, 2016

No. 325353
Kalamazoo Circuit Court
LC No. 2013-006213-DM

Before: MURPHY, P.J., and WILDER and BORRELLO, JJ.

PER CURIAM.

Plaintiff Katie Conley-Watson appeals as of right a judgment of divorce entered by the trial court following a three-day bench trial. Plaintiff challenges the trial court's award of spousal support to defendant Mark Watson, as well as the court's ruling requiring plaintiff to pay some of defendant's attorney fees incurred in the divorce action. We affirm.

In a decision issued by the trial court on September 10, 2014, which contained a well-written, concise, and accurate recitation of the procedural history of the case and the evidence presented at trial, the court awarded defendant $1,000 per month in spousal support until the marital home was sold, $1,900 per month thereafter for a period of six years, and $1,200 per month thereafter for a period of four years. The trial court indicated that "spousal support shall be always modifiable in this case." The written decision also provided that plaintiff was to pay $9,000 of defendant's attorney fees, spread out over three years, with annual $3,000 payments.[1] After the parties could not agree with respect to the language to include in a judgment of divorce, a motion to settle the judgment was heard, and the trial court subsequently entered a divorce judgment on December 15, 2014. The judgment incorporated by reference a uniform spousal support order that was consistent with the trial court's written decision. The uniform spousal support order did provide that spousal support for plaintiff was forever barred, that the order would terminate upon defendant's remarriage, and that spousal support for defendant could also be terminated, or modified, "upon a requisite showing of a change in circumstances." Further,

[1] The parties were able to settle matters pertaining to child custody and support, parenting time, and division of the marital estate and property, except with regard to bank accounts and debts.

the divorce judgment awarded defendant $9,000 in attorney fees consistent with the trial court's written decision.

On appeal, plaintiff generally agrees with the trial court's factual findings. The evidence showed and the trial court found: that the parties were married in December 2001; that plaintiff filed her complaint for divorce in July 2013; that the parties had twins who were born in May 2007; that defendant had worked as a mechanical engineer earning around $38,000 per year prior to the marriage; that defendant was not employed during the marriage itself; that defendant acted as the general contractor relative to the construction of the marital home, which construction commenced about the time of the marriage; and that, while they lived in the house beginning in 2003, by the end of the marriage the home had still not been fully completed.[2] The evidence further reflected and the trial court additionally found: that defendant had, as described by the trial court, "a rather heavy drinking problem;" that defendant remained home and took care of the two minor children before they started school, but then continued to stay home and did not obtain employment after the children entered school;[3] that defendant did not have a college

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[2] The trial court observed:

> The [d]efendant was supposed to complete the construction of the home, including all of the finishing work. The [d]efendant had never been a general contractor for construction of a home or involved in home construction previously. His education was in mechanical design. Clearly, from the photographs admitted into evidence and testimony of the parties, the [d]efendant got into something over his head with this project. It appears to his [c]ourt that the [d]efendant was somewhat of a "jack of all trades and master of none" when it came to really putting the finishing touches on this home. In fact, he testified that he is still currently working on many projects. . . . The parties never agreed that the [d]efendant would not finish this home. From this [c]ourt's viewpoint, the [d]efendant did not know what he was doing and used this home as a trial and error. Examples of the [d]efendant's unfinished work are the painting, molding, and trim inside, the eves in the back of the home, and the landscaping and drainage. The [d]efendant was clearly not honest and forthright with this [c]ourt in answering questions regarding what he accomplished on a day-to-day basis. . . . According to the [d]efendant's testimony, he spent hours and hours working on the driveway, landscaping, and the parties' trucks. The landscaping and lawn are a disaster and certainly will not help the resale of this home. The home is not finished. He had the time and opportunity to finish the job but did not.

[3] The trial court stated:

> When the children were preschool, the [d]efendant was home taking care of them. When they started school, he stayed home. After the divorce was filed, he stayed home. The [d]efendant is bright, talented, and has the potential for employment in many different areas, but has been unmotivated and reluctant to really seek out any employment opportunities, full-well knowing that a divorce is eminent [sic] and he will be jointly financially responsible for the care and

degree; that he was a few classes short of obtaining a mechanical design degree from Kalamazoo Valley Community College (KVCC);[4] and that he had enrolled in one class at KVCC in April 2014, after not attending KVCC since 1999. Finally, the evidence showed and the trial court found: that plaintiff has a college degree; that she worked in the broadcasting-marketing business before and during the marriage; that she was currently earning $135,000 per year in salary; and that, as characterized by the trial court, she "helped around the home and with the children."

The trial court opined that defendant had the "educational level and skills to do many different jobs" and that he had "no physical or mental disability that would affect his ability to obtain gainful employment." The court, therefore, imputed income to defendant in the amount of $35,000 per year. We note that the parties were awarded, per their agreement, joint legal and physical custody of the children, and that plaintiff was ordered to pay, upon sale of the marital home, $652 in monthly child support. Further, with respect to the division of property, the judgment of divorce required that the marital home be put on the market for sale, with the parties sharing "equally in all agreed-upon improvements."[5] The divorce judgment awarded plaintiff one of the parties' vehicles, awarded defendant two vehicles, ordered the sale of two other vehicles and a motor home, with the parties to equally divide the proceeds of the sales, divided a variety of miscellaneous personal property items pursuant to an attached, stipulated property list, equally divided any monies in joint or separate accounts as of October 1, 2014, and awarded defendant $30,271 of plaintiff's 401(k).[6] With respect to marital debts, the trial court observed in its written decision that "[t]he parties are fortunate, in that they have very little debt to service and did not have outrageously expensive lifestyles." The judgment of divorce provided that while the parties continued to cohabitate in the marital home, plaintiff would be responsible for

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> maintenance of the minor children. It also appears that the [d]efendant did not do a very good job in cleaning and maintaining the home. From the totality of the evidence, this [c]ourt seriously questions this [d]efendant's claim to be the primary caregiver for the minor children; particularly since they have been in school.

[4] Defendant testified that it "would probably" take two years to earn his degree.

[5] The judgment did not indicate how any proceeds from the sale of the home were to be divided; however, it appears that the matter was not addressed because, as reflected by the record, the house had no or negative equity, given the amounts of an outstanding mortgage and home equity loan.

[6] Plaintiff's 401(k) had a balance of $71,284 as of November 2013, and the balance had apparently grown by the date of division, May 30, 2014, to nearly $75,000. Pursuant to the parties' stipulation, the amount of $14,248 of the 401(k) was treated as plaintiff's separate property, having accrued prior to the marriage, with the parties equally dividing the remaining amount. In regard to bank accounts, the record is simply not clear as to how much each party received under the divorce judgment, as it simply called for the equal division of the accounts. The trial evidence concerning the bank accounts was confusing, considering numerous account changes and transactions, with the court noting that no proofs had been submitted concerning current balances. In closing arguments, defendant did request an award of $21,000 relative to the division of the bank accounts.

paying all bills and debts associated with the house, that plaintiff was otherwise responsible for paying any debts personally incurred by her or connected to property awarded to her, and that defendant was responsible for paying any debts personally incurred by him or connected to property awarded to him.

In its written decision, the trial court recited the spousal support factors set forth in the caselaw, see infra, and then reasoned as follows in regard to the awards of both spousal support and attorney fees:

> In terms of spousal support, the parties are continuing to live in the marital home until it sells. The [p]laintiff is the only one employed, although the [c]ourt imputed income to [d]efendant. There is a substantial income disparity which calls for the [p]laintiff paying spousal support to the [d]efendant; particularly to enable him to obtain regular employment and housing for himself and the minor children. The parties were accessing a joint account throughout the marriage and paying all marital expenses from it. It was not until November of 2013 that the [p]laintiff stopped putting her total paycheck into their joint account. Plaintiff opened her own account . . . and began putting $1,000 per paycheck in that account. In April of 2014, the [p]laintiff began putting only $1,800 per payperiod in their joint account. The [p]laintiff testified that, the reason she did that was that there were a number of things that the [d]efendant wanted to purchase that she was not in agreement with. No proofs were presented during trial to update the [c]ourt on the amount that presently exists in either account. The parties did divide their 2013 [f]ederal [i]ncome [t]ax return of $9,257 equally. It appears that the funds have been used for expenses during the marriage, including attorney fees and mediator fees incurred by both. The [d]efendant, although he has had access to the joint account during the marriage, is now claiming that the [p]laintiff should pay a substantial portion of his attorney fees because of the income disparity. Clearly, the [d]efendant does not have the financial wherewithal to afford the attorney fees that have been generated by this litigation. . . . The [d]efendant's attorney fee balance as of July 25, 2014 was $15,532.
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> Because the parties continue to live together and [p]laintiff is paying all of the bills, the [d]efendant has no expenses independent of the [p]laintiff except for attorney fees and miscellaneous personal expenses. The [d]efendant testified that he wanted to use his share of the 401(k) monies to purchase a home after the sale of the marital home. He provided a proposed monthly budget; however, the projected expenses were based upon him continuing to live in the marital residence and not in a residence that he will most likely be able to purchase and afford. Once the marital home is sold, the [d]efendant should be receiving child support in the neighborhood of $640 per month. It appears to this [c]ourt that the [d]efendant should have expenses of something in the neighborhood of $3,400 per month when he gets out on his own. The [p]laintiff has a monthly net income of around $7,800 and clearly has the ability to pay spousal support.

On appeal, plaintiff first argues that the award of spousal support was unfair and inequitable under the factual circumstances presented in this case. We review a trial court's

award of spousal support for an abuse of discretion. *Loutts v Loutts,* 298 Mich App 21, 25; 826 NW2d 152 (2012). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Woodington v Shokoohi,* 288 Mich App 352, 355; 792 NW2d 63 (2010). Any findings of fact relating to the award are reviewed for clear error. *Id.* A finding of fact "is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made." *Id.* Deference is given to a trial court's findings of fact that are based on the credibility of witnesses. *Id.*

MCL 552.23(1) contemplates a case-by-case approach in determining an award of spousal support. *Loutts,* 298 Mich App at 29-30.[7] "The primary purpose of spousal support is to balance the parties' incomes and needs so that neither party will be impoverished, and spousal support must be based on what is just and reasonable considering the circumstances of the case." *Id.* at 32. A court should consider all relevant factors in determining an appropriate award of spousal support, including:

> (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 the amount of property awarded to the parties; (5) the parties' ages; (6) the abilities of the parties to pay support; (7) the present situation of the parties; (8) the needs of the parties; (9) the parties' health; (10) the parties' prior standard of living 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. [*Woodington,* 288 Mich App at 356 (citation omitted).]

Rehabilitative spousal support is intended to allow a party to assimilate into the work force and establish economic self-sufficiency. See *Friend v Friend,* 486 Mich 1035; 783 NW2d 122 (2010). "Spousal support does not follow a strict formula." *Loutts,* 298 Mich App at 30.

With respect to her spousal support argument, plaintiff initially contends that the trial court failed to take into consideration her financial needs and her actual ability to pay spousal support. Plaintiff couches the argument by noting that the "parties and their counsel were not particularly effective in the production of evidence and testimony regarding routine actual

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[7] MCL 552.23(1) provides:

> 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 . . ., the court may also 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.

monthly expenses and debts[.]" In other words, plaintiff is acknowledging that she failed to present much by way of evidence relative to her future budget. We, however, are confined to the record. MCR 7.210(A) ("Appeals to the Court of Appeals are heard on the original record."). The trial court stated that plaintiff had a monthly net income of approximately $7,800 on her annual gross income of about $135,000. And the trial court recognized that plaintiff would have to pay child support of nearly $650 per month. The court also believed that plaintiff "clearly ha[d] the ability to pay spousal support," reflecting contemplation of not only plaintiff's income but her ability to support herself and, at times, her children, despite having to pay spousal and child support. Subtracting $1,900 in monthly spousal support and $650 in monthly child support from plaintiff's net monthly income of $7,800 leaves $5,250 for plaintiff to use for housing, food, utility bills, clothing, and other necessary costs and living expenses, which appears quite reasonable and feasible. Contrary to plaintiff's suggestion, she was not left impoverished by the trial court's award of spousal support to defendant. To the extent that there are out-of-the-ordinary expenses or other debts for which plaintiff is obligated to pay, she does not identify those expenses, let alone cite record evidence of the expenses.

Still in the context of her spousal support argument, plaintiff viscerally complains as follows:

> Based upon the . . . findings of fact by the court, it is inconceivable how and why the trial court awarded 10 years of spousal support to a husband who is a liar, at fault for the breakdown of the marriage, a drunk, lazy, unmotivated, and voluntarily unemployed with only a few credits short of obtaining a college degree. . . . Defendant was awarded 1/3 of [p]laintiff's net monthly income for a period of six (6) years, and then 1/4 of her net monthly income for an additional four (4) years. Coupled with what the court believes [d]efendant should be making now [imputed income], [d]efendant has income or disposable assets of $2,000.00 per month in excess of his imaginary monthly expenses of $3,400.00. The goal of any spousal support is to maintain a lifestyle approximating the previous standard of living of **both** parties. Defendant continues his life style at the expense of [p]laintiff while [p]laintiff struggles to maintain hers at the same time. The trial court's dispositive ruling clearly falls outside the range of reasonable and principled outcomes and is inequitable. The length of this marriage and [d]efendant's potential ability to earn a greater income in two to three years alone contraindicates an award of 10 years of spousal support. Coupled with [d]efendant's fault in the breakdown of the marriage and his lack of motivation to obtain a job or income, the dispositive ruling by the trial court relating to spousal support is rather shocking.

We cannot conclude that the trial court *abused its discretion* with respect to the amount of the award and the duration of the award. Although the trial court imputed $35,000 to defendant in annual income, the fact remains that defendant is unemployed and needs to secure and provide suitable housing for him and his two children given the joint custody arrangement,

pursuant to which the parties equally share parenting time.[8] It will likely be a financial struggle to survive and cover all of the necessary living expenses on the total amount awarded in spousal and child support, and the awards are not that significant given plaintiff's six-figure income. Indeed, the amount of spousal support set by the trial court, when considered in conjunction with the child support award, is at a level that will hopefully support adequate living arrangements for defendant and the children, while at the same time motivate defendant to find employment to better the situation for all. Additionally, defendant did care for the children for a portion of the marriage while plaintiff worked outside the home, the parties were married for 12 years, there was a relatively small amount of property available and awarded to defendant, he did engage in efforts regarding the construction of the marital home, in which, despite the various shortcomings, the family was able to reside, defendant lacked a college degree, and, while perhaps his own fault for that part of the marriage following the children's entry into school, defendant was not employed during the marriage.[9] These facts all lend support for the trial court's award of spousal support. Further, if circumstances change in a manner that calls for termination of or a reduction in spousal support, plaintiff will be free to pursue a motion seeking alteration of the award. Reversal is unwarranted.

Plaintiff next contends that the trial court clearly erred in its factual findings and abused its discretion with respect to the award of $9,000 in attorney fees. The central premise of plaintiff's argument is that the trial court failed to consider that defendant had used his portion of the 2013 federal income tax return, approximately $4,628, to pay toward his attorney fees, and thus the balance owed relative to attorney fees was lower than the court believed it to be when the court awarded defendant $9,000 in fees.

We review a trial court's decision whether to award attorney fees in a divorce action for an abuse of discretion. *Woodington,* 288 Mich App at 369. Any related factual findings by the trial court are reviewed for clear error. *Id.* Under MCR 3.206(C), a party requesting attorney fees in a divorce action has the burden of showing sufficient facts to justify an award. *Id*. at 370.[10] The attorney fees must be necessary for the party to prosecute or defend the action.

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[8] We note that, for income tax purposes, spousal support under the divorce judgment is treated as income for defendant and is deductible by plaintiff. We also note that the 10-year period of spousal support coincides quite closely to the children reaching the age of majority.

[9] There was evidence that defendant had made some attempts at obtaining employment.

[10] MCR 3.206(C) provides, in relevant part:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding . . . .
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> (a) the party is unable to bear the expense of the action, and that the other party is able to pay[.]

Myland v Myland, 290 Mich App 691, 702; 804 NW2d 124 (2010). Requested attorney fees must also be reasonable. *Stallworth v Stallworth,* 275 Mich App 282, 288; 738 NW2d 264 (2007). The party requesting attorney fees must additionally show that the attorney fees were incurred. *McIntosh v McIntosh,* 282 Mich App 471, 483; 768 NW2d 325 (2009). This Court has also held that where a party is required to rely on assets for support, the party should not be required to invade those assets to pay for attorney fees. *Woodington,* 288 Mich App at 370. A party may demonstrate an inability to pay attorney fees by showing that he or she has yearly income less than the amount owed in attorney fees. *Myland,* 290 Mich App at 702. Ultimately, however, the particular factual circumstances of the case govern whether there is an ability to pay for attorney fees. *Loutts v Loutts (After Remand),* 309 Mich App 203, 217-218; __ NW2d __ (2015). "This requires a trial court to give 'special consideration to the specific financial situations of the parties and the equities involved.' " *Id.* at 218, quoting *Myland,* 290 Mich App at 703.

At trial, defendant testified, and an invoice summary was admitted into evidence showing, that defendant had been billed or owed $15,532 as of July 25, 2014, which was a few days prior to defendant's testimony (July 29); there would be one more day of trial on August 8, 2014. Defendant testified that a "majority" of his half of the income tax refund had been used to pay attorney fees. In the trial court's written decision, it stated that defendant's "attorney fee balance as of July 25, 2014[,] was $15,532[,]" and it ruled that a $9,000 attorney-fee award was "fair and equitable." As part of plaintiff's appellate argument, she claims that defendant's "realistic attorney fee balance" was approximately $11,000, as decreased upon contemplation of payments made using the tax money, and that ordering her to pay $9,000 of that amount was unfair and inequitable.

First, it is entirely unclear from the record whether the $15,532 represented total billings absent consideration of any payments or whether the amount was the actual balance owing and had already been reduced by earlier payments, including payments made by defendant with the tax return proceeds. The trial court characterized the $15,532 as the "balance," suggesting that previous payments had been taken into account, and plaintiff provides no evidence to the contrary. Also, the trial court stated in its written decision that the income tax refund appeared to have been used by both parties to cover their respective attorney fees and their shares of the mediator's fee; therefore, the court fully recognized defendant's use of his tax return proceeds to pay attorney fees. And defendant's testimony left open the possibility that a significant amount, but less than a majority, of his share of the tax return was *not* used to pay attorney fees. Moreover, the trial court's written decision was issued on September 10, 2014, and the court certainly appreciated the fact that one more full day of trial had taken place on August 8, 2014, with defendant incurring additional attorney fees. Plaintiff has simply not established any clear error with respect to the trial court's factual findings.

Plaintiff next contends that defendant was not without funds to pay his attorney fees, asserting that he made payments to counsel from the parties' joint accounts, that he was imputed annual income of $35,000, and that his yearly income, as imputed, was not less than the total amount of his attorney fees. It is not clear from the record how much in attorney fees defendant actually paid using funds from the parties' bank accounts, but it is clear that he did not have unfettered access, allowing him to fully satisfy the bills generated by his attorney. With respect to the imputed income, it was still $100,000 less than plaintiff's annual gross income. And the

fact that the annual imputed income was greater than the attorney-fee debt did not dictate a ruling rejecting an award of attorney fees. See *Loutts (After Remand)*, 309 Mich App at 217 (This Court "did not state that when a party's attorney fees exceed that party's yearly income, it is dispositive of the party's ability to pay in all cases."). Rather, under the facts and circumstances of this case, defendant "demonstrate[d] an inability to pay" his attorney fees. *Id.* The trial court did not clearly err when it found that defendant did not "have the financial . . . [ability] to afford the attorney fees that ha[d] been generated by this litigation." The trial court did not abuse its discretion in awarding defendant $9,000 in attorney fees.

Finally, plaintiff maintains that the parties had stipulated that spousal support would terminate upon romantically-associated cohabitation by defendant with another person, yet the trial court failed to make this agreement part of the judgment of divorce. In his *rebuttal* closing argument, plaintiff's counsel stated, "I think [defense counsel] and I have agreed and the parties have agreed that with regard to any spousal support order you do make, . . . that obligation would cease upon cohabitation or remarriage on the part of [defendant]." Plaintiff argues on appeal that defense counsel's failure to object or voice any disapproval reflected acceptance of the purported agreement. At the subsequent hearing on the motion to settle the judgment, defendant's attorney stated that plaintiff had never raised the issue of cohabitation, after the court had asked defense counsel about cohabitation and its impact on spousal support. Plaintiff's attorney did not argue that there had been an agreement on cohabitation relative to spousal support, but instead urged the court to provide for termination of spousal support upon cohabitation because it would be "unfair" not to do so. At the same hearing, the trial court ultimately ruled:

> I rarely, if ever, put cohabitation in as a term. . . . [I]f you read my opinions for the last 16 years, you will never see it in there. So unless there's a really, really good reason for me to do it or *an agreement*, I don't do it. So all right. Any questions? [Emphasis added.]

Plaintiff asserts that there had indeed been an agreement as evidenced by her attorney's statement during rebuttal closing argument at trial and defense counsel's silence upon hearing the statement. We note that plaintiff's attorney himself sat silent at the hearing on the motion to settle the judgment when the court asked if there were any questions relative to cohabitation. Counsel did not exclaim that an agreement had existed. The trial court did include a provision in the divorce judgment, as incorporated by the uniform spousal support order, which provided for the termination of spousal support upon defendant's remarriage.

Plaintiff's counsel's vague and equivocal statement during rebuttal closing argument, in the face of silence, that he *thought* there was an agreement concerning "cohabitation *or* remarriage" (emphasis added) simply did not amount to a binding agreement that spousal support would terminate upon defendant's cohabitation, and this became abundantly clear at the hearing to settle the judgment. See MCR 2.507(G) ("An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney."); *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452-453; 733 NW2d 766 (2006) (a settlement agreement is governed by the law of contracts and requires mutual assent or a meeting of the minds). There was no "agreement . . . made in open court" and no mutual assent or meeting of the minds with respect

to cohabitation. Furthermore, if defendant ever does cohabitate while still receiving spousal support, plaintiff could pursue termination of or a reduction in support, arguing a change of circumstances. Reversal is unwarranted.

Affirmed. Exercising our discretion under MCR 7.219, we decline to award taxable costs in this case.

/s/ William B. Murphy
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello