STATE OF MICHIGAN

COURT OF APPEALS

LYNDA R. SCHALK, Plaintiff-Appellant,	UNPUBLISHED January 11, 2018
v	No. 337541 Muskegon Circuit Court
THOMAS R. SCHALK, Defendant-Appellee.	LC No. 15-000264-DO

Before: METER, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right a March 7, 2017, judgment of divorce entered after a bench trial. We affirm.

The parties divorced after 31 years of marriage. The evidence revealed that defendant, 60 years old at the time of trial, worked as a self-employed painter and disc jockey (DJ).[1] Plaintiff, 55 years old at the time of trial, was employed part-time, working 20 to 24 hours a week as a daycare worker at $9 an hour; she had worked part-time throughout the marriage while raising the parties' children. In light of the disparity in the parties' incomes, the trial court awarded spousal support to plaintiff as follows:

> IT IS FURTHER ORDERED AND ADJUDGED that defendant shall pay plaintiff periodic spousal support subject to modification in the amount of $600.00 per month for seven (7) years commencing March 1, 2017 or until plaintiff's remarriage or death, whichever occurs first, or further order of the [c]ourt.
>
> IT IS FURTHER ORDERED AND ADJUDGED that spousal support is also preserved for plaintiff to insure payment of debt and obligations assigned to the defendant.

[1] Defendant asserted that his income, after expenses, from the painting business was approximately $15,000 a year and that his income from the DJ business was generally less than $10,000 a year. Plaintiff implied at trial that defendant was underreporting his income.

The trial court awarded the marital home to defendant but ordered that he pay plaintiff "her half of the net equity . . . ." The parties had owned two empty parcels of land, and the court awarded one parcel to plaintiff and one to defendant. The court awarded two boats, a motorcycle, and a truck (total value of $5,500) to defendant and a car to plaintiff. The court awarded an annuity (total value of $1,400) to defendant, and the court divided various credit-card and other debts between the parties.

Plaintiff first argues that the trial court erred in failing to place a value on defendant's two businesses and in awarding them to defendant, thus effectively depriving plaintiff of assets to which she was entitled. Plaintiff argues that this was contrary to the trial court's explicit finding that fault was not an issue to take into consideration when dividing the marital assets and that assets should essentially be divided equally.

We review for clear error the trial court's factual findings in divorce proceedings. *Sparks v Sparks*, 440 Mich. 141, 151; 485 NW2d 893 (1992). "[F]actual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). "If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts. *Sparks*, 440 Mich at 151-152. "[T]he [dispositional] ruling should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable." *Id*. at 152. When apportioning a marital estate, the goal is to make an equitable division of the marital property in light of all the circumstances. *Byington v Byington,* 224 Mich App 103, 114; 568 NW2d 141 (1997).

First, plaintiff is correct that the trial court explicitly found that fault was not a salient issue in this case. In its February 14, 2017, opinion, issued before the judgment of divorce, the court stated that "fault is not an issue of such significance that [it] requires this [c]ourt to take such into consideration in the distribution of the parties' property." The court followed up this statement by indicating that, "[a]ccordingly, an equitable division of marital assets, as prescribed by law and equity, is appropriate in this case."

The court stated as follows with regard to the businesses:

> Tom's Quality Painting operates as a painting concern contracting its services for residential properties. As a general proposition, the [d]efendant works alone or sometimes hires a part-time employee. Mr. Schalk has been so employed for well upwards of 20, approaching 25 years. Gross revenues for the past three years have averaged approximately $35,000 . . . .
>
> Tom's Quality Sound functions as a Disc Jockey business for hire for Proms, Wedding Receptions, and Private Parties. Again, the [d]efendant usually works alone. Gross revenues for this business for the same three year period averaged approximately $34,000.
>
> It has been the general acknowledgement of both parties that both of the aforementioned businesses are operated on a cash basis and . . . that the value of

> the business is essentially the labor and the "goodwill" that are provided by Thomas Schalk.
>
> * * *
>
> The parties are . . . generally in agreement that both businesses are primarily reliant upon the labor and goodwill of the [d]efendant. Accordingly it is the decision of the [c]ourt that both businesses and the equipment needed to carry out the functions of the businesses are awarded to the [d]efendant in their entirety.

At trial, defendant testified that he performed the painting work himself, with occasional help for "bigger" jobs. He stated that he operated the painting business in cash and that he had "[m]inimal" equipment for the business. He testified that he had no scaffolding but had "I think three ladders." He stated that he hauled the painting equipment in his truck. With regard to the DJ business, defendant stated that he had "one guy that will cover for me once in awhile . . . ." Concerning DJ equipment, he stated that he had "speakers, amplifiers, you know, such, mixer boards [sic]" but that "[i]t's really old stuff . . . ." He testified that "[u]sed equipment is pretty hard to sell." He estimated the value of his Cliff speakers as $350, some other speakers as $500,[2] two amplifiers as $250 each, a "small laptop computer" as "a couple hundred bucks," and his digital mini disc player as $25 or $30. Defendant indicated that he hauled the equipment in a cargo trailer. He testified that he owned three cargo trailers but that only one was truly functional and reliable.

In his trial brief, defendant stated that "[t]he parties have agreed that neither of the [d]efendant's businesses have a value, they being Tom's Custom Painting and Quality Sound." In plaintiff's trial brief, she mentioned the painting business but did not assign any value to it. With regard to the DJ business, she stated that it involved "a significant amount of loud speakers, amplifiers, receivers, etc." She further stated:

> Defendant should be awarded his painting business for which he claims there is "no value." The business includes significant painting equipment. The business has a cargo hauler, trailers, two flatbed trailers. The value to defendant may very well be "a job".
>
> Plaintiff should be awarded the DJ business and equipment (Quality Sound), which includes three cargo trailers to haul the sound equipment. (Plaintiff has worked the DJ business. Defendant will state the business has no value. The business may very well be "a job" to supplement plaintiff's income. Defendant maintains the DJ business has "no value".)

At trial, the following colloquy took place between plaintiff and her attorney:

[2] The testimony is unclear, but plaintiff may have been stating that he owned two pairs of these other speakers, valued at $500 for each pair.

Q. And there are two businesses in this marriage. Is that correct?

A. Yes.

Q. And you elected not to go ahead and hire anybody to value them. Is that right?

A. Yes.

Q. And why is that?

A. I just don't want to deal with it.

Q. Pardon me?

A. I don't want to deal with it.

We find no error with regard to the trial court's treatment of the painting business. Plaintiff argued below that the business should be awarded to defendant because it constituted his "job." She further stated that she did not want to "deal" with assigning a value to the business. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008) (quotation marks and citation omitted). In addition, while plaintiff argues that the trial court erroneously failed to assign a value to the painting business, defendant testified that he had "[m]inimal" equipment for the business, and plaintiff did not counter defendant's testimony at trial. Moreover, the trial court did not truly find the business "valueless" but instead, it essentially agreed with plaintiff's argument in her trial brief—that the painting business was dependent on defendant's goodwill and labor and that this business and the necessary equipment should therefore be awarded to defendant, so he could continue to carry out his job.

We also find no error with regard to the DJ business. Defendant offered testimony about a minimal value for the DJ equipment, and plaintiff *chose not to counter this testimony*. In addition, the trial court, as with the painting business, found that the DJ business was dependent on the goodwill and labor of defendant and that he should be awarded the DJ equipment in order to continue doing his job. While plaintiff argued in her trial brief that she "has worked the DJ business," she did not mention the DJ business at trial when asked about her current and past employment. When asked about bank deposits from the businesses, she stated, "When *he* got a check to Quality Sound, he put it into Quality Sound and [would] pay whatever, a DJ or whatever . . . ." (Emphasis added.) There is simply no basis for reversal with regard to the trial court's treatment of the DJ business. Although there was some testimony that plaintiff assisted at times with the businesses, the trial court did not clearly err in finding that the DJ business, like the painting business, was, for the most part, dependent on the "goodwill" and labor of defendant. Contrary to plaintiff's assertion, the trial court had enough information, under the unique circumstances of this case, to make a decision regarding both businesses. Cf. *Steckley v Steckley*, 185 Mich App 19, 23; 460 NW2d 255 (1990). The court properly determined that the minimally-valued physical assets of the DJ business should be awarded to defendant in order for him to continue his DJ job.

Plaintiff next argues that the trial court should have awarded her more in spousal support. "The award of spousal support is . . . within the trial court's discretion. The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case." *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336 (2008) (citation omitted). Relevant factors include:

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

Plaintiff cites the prognosticator report[3] recommending that she be awarded $1,417 a month in spousal support. The trial court undertook a comprehensive analysis of the pertinent factors in reaching its spousal-support determination, finding that many factors (the length of the marriage, the ability of the parties to work, the source and amount of property awarded to the parties, the ages of the parties, the present situation and needs of the parties, and the parties' prior standard of living) favored an award of spousal support. The court found that "[p]laintiff's ability to maintain some semblance of the life that she has lived for the last few years would be significantly compromised without some financial assistance." It further found that "[d]efendant . . . is far better positioned to weather the adjustments that will come about as a result of the divorce." The court also noted that plaintiff had a limited skill set with regard to her ability to obtain more lucrative employment. The court did not lend credence to defendant's expressed concerns about being able to pay spousal support, stating that "the availability of work was not a concern that this [c]ourt recalls being asserted by [d]efendant." The court declined to award the amount recommended by the prognosticator, however, stating:

> The court is further of the opinion that there does exist for [p]laintiff an unrealized potential for more full time employment. This [c]ourt doesn't assert it would be easy to fulfill that potential, but it is doable . . . .
>
> The [c]ourt is not convinced that [p]laintiff has been as diligent as possible in securing more substantial employment.

[3] This document states on its face that the formula employed "provides a starting point for determining an award of alimony. It considers four of the objective factors considered in determining an alimony award. The other more subjective factors should also be reviewed to see if there is a greater or lesser need for spousal support in this specific case."

We find no basis for reversal with regard to the trial court's award of spousal support. As noted by defendant, the trial court was basing defendant's income on his working of two jobs, as a painter and a DJ. Meanwhile, plaintiff was working only part-time. The parties' three children were 30, 34, and 36 years old at the time of trial; thus, child-rearing duties were no longer an issue. Plaintiff testified at trial that, in the past, she had "worked at Meijer, and administration office for the Girl Scouts. I cleaned homes . . . ." She testified that there was not "any more time available" to work at her current job at the daycare center, where she had been working for four years. Plaintiff offered no evidence that she had attempted to find full-time employment elsewhere but had been unsuccessful. Under the circumstances, it was not an abuse of discretion or unduly speculative for the trial court to acknowledge that plaintiff had not been diligent in seeking full-time employment. The spousal-support award was just and reasonable under the circumstances. *Id*. at 726.

Plaintiff lastly argues that the trial court erred in failing to award additional attorney fees. We review for an abuse of discretion a trial court's decision regarding whether to award attorney fees. *Gates v Gates*, 256 Mich App 420; 664 NW2d 231 (2003). Under MCR 3.206(C), in domestic-relations cases:

> (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, including a post-judgment 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, or
>
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

In her amended trial brief, plaintiff wrote: "Plaintiff requests an attorney fee of $5,000, which in all likelihood will be uncollectible." The trial court stated the following in its opinion:

> The [c]ourt accepts the assertion of [d]efendant that the Bank of America credit card, for which this Opinion places responsibility with [d]efendant, was used in part to pay [p]laintiff's attorney fees. Accordingly, each party is solely responsible for the payment of the remaining balance of their respective attorney fees.

Plaintiff acknowledged at trial that her initial attorney fee had been placed on the Bank of America card and that defendant was making the payments on that card. But she contends that the court should have awarded her further money for attorney fees. She states, in reference to MCR 3.206(C)(2)(b), that she had to file two motions to enforce the court's order that defendant continue funding the marital account during the pendency of the case. In her August 8, 2016, "motion to enforce order of court," plaintiff requested that the trial court "award actual attorney fees for having to bring this unnecessary Motion . . . ." However, plaintiff points to nothing in

the record indicating how this motion was resolved. There is insufficient evidence, in connection with this motion, that "attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply." MCR 3.206(C)(2)(b). In her February 21, 2017, "motion to enforce order," plaintiff requested $600 in attorney fees for having to file the motion. A hearing took place on March 7, 2017, after the bench trial and after the issuance of the trial court's opinion regarding attorney fees. The court stated: "We're done. I'm not enforcing interim support orders when I have issued an opinion that has divided and made allowance for the distribution of properties and moneys for people to go their separate ways. I'm not doing that. Your motion is denied." Plaintiff does not attempt to appeal this ruling by the trial court, and thus there is no factual basis for her assertion that the trial court should have awarded her attorney fees in conjunction with the motion, which was *denied*.

Plaintiff further contends, in support of her request for additional attorney fees, that she sufficiently demonstrated that she "is unable to bear the expense of the action and that [d]efendant[] has the ability to pay." She asserts that the trial court's ruling regarding attorney fees was arbitrary and insufficiently explained. Plaintiff cites *Woodington v Shokoohi*, 288 Mich App 352, 371; 792 NW2d 63 (2010), wherein the Court stated that the trial court erred in "fail[ing] to explain its decision to award plaintiff only $25,000 [in attorney fees], less than half of the amount requested." The *Woodington* Court stated that the plaintiff in that case had not received any liquid assets and might be unduly burdened if forced to pay her attorney fees, which totaled over $80,000. *Id*. at 371-372. We find *Woodington* distinguishable. As noted, plaintiff requested, in her trial brief, $5,000 in attorney fees. At trial, plaintiff stated that the balance on the Bank of America card was "[a]round 24 or 2500" and that this represented her "initial attorney fee." She denied that any other charges were on the card. She also admitted that defendant was making the payments on this card. Accordingly, it is apparent that the trial court was assigning some of plaintiff's attorney fees to defendant.[4] Unlike in *Woodington*, plaintiff was to receive some liquid assets, because the parcel of property she was awarded had already been contracted for sale for $18,000,[5] cf. *Woodington*, *id*. at 371 ("plaintiff did not receive any liquid assets other than the payment of alimony-in-gross over a six-year period"), and plaintiff did not, in her trial brief, elaborate on her attorney-fee request other than to say: "Plaintiff requests an attorney fee of $5,000, which in all likelihood will be uncollectible." In light of facts, findings, awards, and arguments in the case, it is apparent that the decision by the trial

[4] Plaintiff states that she was requesting attorney fees of $5,000 "in addition to the $2,500 that had already been paid with the credit card," but this was not made clear in the trial brief. Plaintiff also argues that this $2,500 was not a true attorney-fee award because the trial court split the parties' debts, including this credit-card bill, roughly evenly. However, the court essentially treated the fee as a *marital* debt when it was not obligated to do so; accordingly, the $2,500 did represent, at least in part, an attorney-fee award.

[5] The record demonstrates that the sale of this parcel did indeed go through, and it appears, from context, that plaintiff was scheduled to receive the $18,000 check on March 7, 2017. In addition, defendant was ordered to pay plaintiff $43,000, representing her half of the net equity in the marital home, within 120 days of entry of the judgment of divorce.

court to have defendant pay a portion of plaintiff's requested attorney fee was reasonable, despite the court's failure to give a detailed analysis of its attorney-fee decision. Plaintiff has not sufficiently demonstrated that she was not able to bear the expense of the action. MCR 3.206(C)(2)(a).

Affirmed.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra