

STATE OF MICHIGAN
COURT OF APPEALS

PAUL J. AYRES,

Plaintiff-Appellant/Cross-Appellee,

v

RAELENE M. AYRES,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

December 22, 2011

No. 297989

Otsego Circuit Court

LC No. 08-012830-DO

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment by the trial court of an award of monthly spousal support in the amount of \$800 to defendant. Plaintiff also appeals the trial court's award of the property located on Woodhall Terrace to defendant. Defendant cross-appeals the trial court's denial of attorney fees to defendant. We affirm the trial court's decisions to award spousal support and the Woodhall Terrace property to defendant, reverse the decision of the trial court not to award attorney fees to defendant and remand for a determination of an appropriate amount of attorney fees to award defendant.

I

Plaintiff and Defendant were separated in 2006 and received a Judgment of Divorce in 2010. At the time of their marriage, plaintiff owned a home on Beechwood, in Gaylord, Michigan, and defendant owned a home on Woodhall Terrace, in Palm Harbor, Florida. Both parties contributed to the other's property. In addition to these two properties, the couple invested in many properties throughout the marriage. Three of these properties, on Clark Street, in Clearwater, Florida; on Briarway, in Clearwater, Florida; and on Oakwood, in Dunedin, Florida, were acquired by defendant during the couple's separation. Plaintiff had no knowledge of, or connection to, those three properties. The couple's rental properties operated at large losses, and the couple was in debt.

The trial court determined that plaintiff received a monthly income of \$3,244.74 and had monthly expenses of \$3,063. The trial court also determined that defendant received a monthly income of \$546 and had monthly expenses of \$2,700. Plaintiff's expenses are up-to-date, while defendant's expenses are not. Defendant is expected to receive \$96,000 and a trust amounting to \$147,000 from her father's estate.

During the divorce proceedings, as part of a mediation agreement, plaintiff was required to sell certain stocks that he owned and to put the proceeds towards preparing some of the couple's properties for sale. Instead, plaintiff used most of the proceeds to pay personal expenses. Following an evidentiary hearing, plaintiff was ordered to make monthly temporary spousal support payments of \$500 to defendant. At the time of the trial, he was \$2,904 in arrears.

On April 22, 2010, the trial court awarded defendant \$800 in monthly spousal support payments for ten years or until she dies or remarries. Several of the couple's properties were ordered to be sold, and the proceeds or losses split between them. Defendant was awarded the Briarway, Clark, Oakwood, and Woodhall Terrace properties as separate property. Plaintiff was awarded the Beechwood property as separate property. Neither party was awarded attorney fees.

II

Plaintiff first argues that the trial court gave only a cursory analysis to the *McLain*¹ factors, that defendant has not demonstrated a need for spousal support, and that he is unable to pay; thus, the trial court's award of monthly spousal support to defendant was contrary to the facts of the case and an abuse of discretion. We disagree. This Court reviews a divorce case de novo, and it will not substitute its judgment for that of the trial court absent a showing of abuse of discretion. *Schaffer v Schaffer*, 37 Mich App 711, 713; 195 NW2d 325 (1972). This Court reviews an alimony order de novo, but will not modify an award unless convinced that, had it been in the position of the trial court, it would have reached a different result. *Demman v Demman*, 195 Mich App 109, 110; 489 NW2d 161 (1992). An abuse of discretion occurs when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

The factors for determining the proper amount of spousal support are enumerated in *McLain*, 108 Mich App at 171-172. These factors include the past relations and conduct of the parties, the length of the marriage, the ability of the parties to work, the source and amount of property awarded to the parties, the age of the parties, the ability of the parties to pay spousal support, the present situation of the parties, the needs of the parties, the health of the parties, the prior standard of living of the parties and whether either is responsible for the support of others, and general principles of equity. *Id.* The factors now also include fault, if any, and all other circumstances of the case. *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996). The trial court should make specific factual findings regarding the factors that are relevant to the particular case. *Korth v Korth*, 256 Mich App 286, 289; 662 NW2d 111 (2003). However, marital assets are not to be divided in accordance with any rigid formula; the circuit court must make an equitable division on the basis of the facts proven in each individual case. *Sands v Sands*, 442 Mich 30, 36; 497 NW2d 493 (1993).

In this case, the trial court did not include its analysis of the *McLain* factors in its Judgment of Divorce. However, the trial court did specifically mention several of the *McLain*

¹ *McLain v McLain*, 108 Mich App 166; 310 NW2d 316 (1981).

factors when it made its ruling from the bench. It considered the length of the marriage, the ability of the parties to work, the source and amount of property awarded to the parties, the age of the parties, the ability of the parties to pay spousal support, the present situation of the parties, the needs of the parties, the health of the parties, the parties' prior standards of living, the circumstances of the case, and general principles of equity. Thus, the trial court's analysis of the *McLain* factors was not cursory.

A party requesting spousal support must allege facts that support both a need for support and that the other party has the ability to pay. MCR 3.206(A)(6). The objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party, and support is to be based on what is just and reasonable under the circumstances of the case. *Woodington v Shokoohi*, 288 Mich App 352, 356; 792 NW2d 63 (2010). When both parties are awarded substantial assets, the court, in evaluating a claim for alimony, should focus on the income-earning potential of the assets and not the value of the assets themselves. *Hanaway v Hanaway*, 208 Mich App 278, 296; 295 NW2d 792 (1995).

In this case, the trial court determined that defendant's monthly income was \$546, while her expenses were \$2,700. This is a deficit of \$2,154, and her expenses are not up-to-date. There was a fair amount of difficulty in ascertaining plaintiff's income and expenses. The trial court determined that plaintiff's monthly income was \$3,244.74, while his expenses were \$3,063. This is a surplus of \$181.74, and his expenses are up-to-date. Plaintiff had been paying personal expenses from his business. The trial court stated that it was very conservative when it determined plaintiff's income, and the couple's tax returns indicated that his income had historically been higher than the trial court's estimated amount. While defendant did receive rental property that has the potential to generate additional income, the couple's tax returns indicate that these properties had historically lost far more than they produced. The trial court also stated that it did consider defendant's inheritance when it made its determination. Thus, defendant had demonstrated a need for spousal support, and plaintiff did have the ability to pay spousal support. Accordingly, we affirm the trial court's award to defendant of \$800 in monthly spousal support payments for ten years or until she dies or remarries.

III

Plaintiff next argues that he contributed to the Woodhall Terrace property and that the trial court failed to make detailed findings of fact regarding the *Sparks* factors; thus, the trial court's award of the Woodhall Terrace property to defendant as her separate property was an abuse of discretion. We disagree. This Court reviews a divorce case de novo, and it will not substitute its judgment for that of the trial court absent a showing of abuse of discretion. *Schaffer*, 37 Mich App 711 713. An abuse of discretion occurs when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Berger*, 277 Mich App at 705. Factual findings are to be upheld unless they are clearly erroneous. *Sands*, 442 Mich at 34.

The court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Generally, marital assets are subject to being divided between the parties, but separate assets may not be invaded. *Woodington*, 288 Mich App at 358. Separate property may

be invaded if, as it appears to the court to be equitable under all the circumstances of the case, the evidence in the case shows that the other party contributed to the acquisition, improvement, or accumulation of the property. MCL 552.401.

In this case, there is no doubt that plaintiff contributed to the improvement of defendant's Woodhall Terrace property. However, defendant contributed to the improvement of plaintiff's Beechwood property. The trial court was aware that each party had contributed to the improvement of the other party's separate property, and it balanced those contributions when it made its decision. Despite the fact that defendant had contributed to the Beechwood property, plaintiff was awarded it as his separate property. Despite the fact that plaintiff had contributed to the Woodhall Terrace property, defendant was awarded it as her separate property. Thus, the trial court made a decision that was equitable under all the circumstances of the case.

The factors for determining the division of the marital estate are enumerated in *Sparks v Sparks*, 440 Mich 141; 485 NW2d 893 (1992). When dividing the estate, the court should consider several factors that are relevant to the circumstances of the case, including the duration of the marriage, each party's contribution to the marital estate, their life statuses, their earning abilities, their ages, their health, their needs and circumstances, past relations and conduct, and general principles of equity. *Id.* at 160. The trial court did not include its analysis of the *Sparks* factors in its Judgment of Divorce. However, the trial court did specifically mention several of the *Sparks* factors when it made its ruling from the bench. It considered the duration of the marriage, each party's contributions to the marital estate, their statuses in life, their earning abilities, the age of the parties, their health, their needs and circumstances, and general principles of equity. Thus, the trial court's analysis of the *Sparks* factors was not cursory.

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. *Living Alternatives for Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994). Multiple times, plaintiff clearly stated that the Woodhall Terrace property was defendant's separate property. Plaintiff testified that he would only change his position, that the Woodhall Terrace property was defendant's separate property, if defendant attempted to claim plaintiff's separate property, the Beechwood property. Defendant did not seek and did not receive Beechwood, and so plaintiff's position in the trial court was that the Woodhall Terrace property was defendant's separate property. Plaintiff may not argue a different position in this Court. Accordingly, we affirm the trial court's award to defendant of the Woodhall Terrace property as her separate property.

IV

Defendant argues that she is unable to bear the expense of defending the divorce litigation, that plaintiff has an ability to pay attorney fees, and that plaintiff refused to comply with a previous court order despite having the ability to comply; thus, the trial court's decision not to award attorney fees to defendant was an abuse of discretion. We agree. A trial court's grant or denial of attorney fees in a divorce action is reviewed for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). Findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007). Attorney fees in a divorce action are awarded at the trial

court's discretion and are appropriate where necessary to enable a party to prosecute or defend the suit. *Heike v Heike*, 198 Mich App 289, 294; 497 NW2d 220 (1993).

Attorney fees may be awarded where the party seeking the award is unable to bear the expense of the action and the other party is able to pay, or attorney fees 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). Attorney fees in a divorce action are not recoverable as of right, but rather such an award of reasonable attorney fees may be available if the record supports a finding that such financial assistance is necessary to enable the other party to defend or prosecute the action. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992).

In this case, the trial court determined that defendant's monthly income was \$546, while her expenses were \$2,700. This is a deficit of \$2,154, and her expenses are not up-to-date. The couple's tax returns indicate that her rental properties have historically lost far more than they produced. The trial court determined that plaintiff's monthly income was \$3,244.74, while his expenses were \$3,063. This is a surplus of \$181.74, and his expenses are up-to-date. Plaintiff had been paying personal expenses from his business. The trial court stated that it was very conservative when it determined plaintiff's income, and the couple's tax returns indicated that his income had historically been higher than the trial court's estimated amount. Thus, defendant has shown an inability to pay attorney fees and plaintiff does have the means to pay attorney fees.

During the divorce proceedings, as part of a mediation agreement, plaintiff was required to sell certain stocks that he owned and to put the proceeds towards preparing some of the couple's properties for sale. Instead, plaintiff used most of the proceeds to pay personal expenses. Following an evidentiary hearing, plaintiff was ordered to make monthly temporary spousal support payments of \$500 to defendant. Plaintiff failed to make most of these payments, and at the time of the trial, he was \$2,904 in arrears. Given the discussion above of plaintiff's financial situation, he had the ability to make those payments. Thus, plaintiff did refuse to comply with a court order despite having the ability to comply. Accordingly, we reverse the trial court's decision not to award defendant attorney fees and remand for a determination of an appropriate amount of attorney fees to award defendant.

Affirmed in part, reversed in part, and remanded in part. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly